

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

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4 ATELIERS DE LA HAUTE-GARONNE (French : CIVIL ACTION  
Corporation) and F2C2 SYSTEMS S.A.S. :  
5 (French Corporation), :

6 Plaintiffs, :

7 v. :

8 BROETJE AUTOMATION-USA INC. (Delaware :  
Corporation), BROETJE AUTOMATION GMBH :  
9 (German Corporation), :

: NO. 09-598-LPS

10 Defendants.

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12 Wilmington, Delaware  
Friday, April 11, 2014  
13 *Jury Trial - Volume E*

14 - - -

15 BEFORE: HONORABLE **LEONARD P. STARK**, U.S.D.C.J., and a jury

16 APPEARANCES:

- - -

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18 BY: MELANIE K. SHARP, ESQ., and  
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19 and

20 KAYE SCHOLER, LLP  
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22 and

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1 APPEARANCES: (Continued)

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#### P R O C E E D I N G S

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(REPORTER'S NOTE: Jury trial proceedings were

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held in open court, beginning at 8:48 a.m.)

1 THE COURT: Good morning.

2 MR. LINDVALL: Good morning.

3 THE COURT: Any issues from plaintiff this  
4 morning?

5 MR. HOROWITZ: Yes, Your Honor. Two brief.

6 THE COURT: Okay.

7 MR. HOROWITZ: Very brief. We don't want to use  
8 a lot of time.

9 THE COURT: All right.

10 MR. HOROWITZ: As you know, but, of course,  
11 we've exchanged at 7:00 a.m., as only we could come up with  
12 that schedule, geniuses that we are, two brief objections to  
13 the plaintiffs' slides.

14 THE COURT: You're objecting to their slides?

15 MR. HOROWITZ: Yes. Two. The first is slide  
16 36, the Brosene reference, and I'm hoping I don't have to  
17 pull out the record.

18 Perhaps Your Honor remembers this, but when  
19 Mr. Lindvall was cross-examining their expert, Mr. Lawrence,  
20 and there was an objection beyond scope, we were told they  
21 were not relying on Brosene to invalidate the patent and so  
22 we didn't cross-examine their expert about Brosene based on  
23 that representation. It was moved into evidence. I'm not  
24 sure we realized this. This is our mistake. At the end of  
25 the day when defense counsel moved in several exhibits and

1       they were talked about with a witness, and we think that it  
2       is inappropriate for them to now put it on a slide and rely  
3       on it for invalidity.

4               THE COURT: All right. Let me hear a response  
5       on that one.

6               MR. KELLEHER: Your Honor, I actually thought I  
7       moved it in with Michael Lawrence. I'm not a hundred  
8       percent certain.

9               THE COURT: In any event, it's in evidence.

10              MR. KELLEHER: Yes.

11              THE COURT: What do you intend to do with it?

12              MR. KELLEHER: We put it in. I asked, what is  
13       this? It's the Brosene patent. What does it show? It  
14       shows the work with rivets in tubes in the prior art and  
15       then I stopped. I didn't ask him to read the claims onto  
16       it. He didn't offer any opinions that it would invalidate  
17       it.

18              THE COURT: What are you going to do with it  
19       today?

20              MR. KELLEHER: It is the scope and content of  
21       the prior art that was disclosed a long time ago.

22              THE COURT: Are you going to argue that it is  
23       part of what invalidates the patent?

24              MR. KELLEHER: No. Shinjo and Offutt were the  
25       two that we specifically offered opinions on.

1 THE COURT: Those are the ones you have opinions  
2 on, but what are you going to argue?

3 MR. KELLEHER: Brosene is the background.  
4 Coiled-up tubes of rivets were in the prior art.

5 THE COURT: Are you going to argue or suggest  
6 that Brosene in part in combination with something else  
7 leads to an obviousness conclusion?

8 MR. KELLEHER: No, Your Honor. The obviousness  
9 argument is Shinjo when used with rivets.

10 THE COURT: All right. What are you going to  
11 say about Brosene today?

12 MR. KELLEHER: Brosene shows that there were  
13 cassettes in the prior art with rivets in tubes.

14 THE COURT: That's all you're going to say?

15 MR. KELLEHER: Yes, Your Honor.

16 THE COURT: And why is that relevant?

17 MR. KELLEHER: It is relevant, Your Honor,  
18 because, it's relevant both to their trade dress and their  
19 patent claim. We had testimony, for example, from  
20 Mr. Auriol that putting rivets in tubes was not very  
21 original. This is an example of that.

22 THE COURT: All right. Mr. Horowitz?

23 MR. HOROWITZ: Just very briefly, Your Honor.  
24 This is what happened yesterday.

25 Mr. Lindvall: Under that condition that Brosene

1 does not invalidate any of the claims of the patent, I don't  
2 have any questions.

3 He didn't say questions, but that's what he was  
4 about to say.

5 The Court: He is not express than go an opinion  
6 that Brosene invalidates?

7 Mr. Kelleher: He did not today. And here is  
8 Brosene underneath a slide that says invalidity and the  
9 prior art.

10 THE COURT: This is a very tricky area, but I'm  
11 going to overrule the objection. There's going to be no  
12 argument that Brosene per se contributes to invalidating the  
13 patent-in-suit. No opinion was offered to that effect.

14 I'm told Brosene was only offered for  
15 background. It's a very fine line distinction between  
16 background and whether in an overall obviousness analysis  
17 it helps support a finding of obviousness. But it's not  
18 how things played out and what Mr. Kelleher represented he  
19 was going to do. I'm not going to make them strike the  
20 slide and I will let him say what he represented he would  
21 say.

22 MR. HOROWITZ: Mr. Lindvall has given me eight  
23 seconds for the next one, so slide 18. All I'm going to say  
24 is we believe this violates directly the instruction you're  
25 going to give on the foreign law and we think that that runs

1       afoul on that instruction.

2               THE COURT: All right. Mr. Kelleher?

3               MR. KELLEHER: Yes, Your Honor. They're still  
4       quoting from the French judgment concerning the supposedly  
5       identical cassette and infringement of the European patent.  
6       We want the jury to understand that both sides have won  
7       various things in Europe and it's still open.

8               THE COURT: All right. I mean, if I could turn  
9       back time, I would keep all of this out because I don't  
10      think it has been helpful to anybody, but I've proposed and  
11      you all agreed to an instruction that I think makes it clear  
12      hopefully to the jury what limited, if any, relevance any of  
13      this has to anything. And so I'm not going to strike the  
14      slide although it certainly is, I think, an attempt to drive  
15      home something that is irrelevant, but if you want to show  
16      pictures of gavels, go ahead.

17              MR. KELLEHER: Thank you, your Honor.

18              THE COURT: Anything else from plaintiff?

19              MR. LINDVALL: No, Your Honor.

20              MR. KELLEHER: No, Your Honor.

21              THE COURT: Issues from defendant?

22              MR. KELLEHER: Nothing, Your Honor.

23              THE COURT: All right. So on the verdict form,  
24      I appreciate you all finding the typographical errors. We  
25      made the changes that you all had agreed on.

1                   Was there anything else before we docket and  
2                   make that the verdict form, the one that you sent to us last  
3                   night? Anything from plaintiff?

4                   MR. LINDVALL: I don't believe so, Your Honor.

5                   THE COURT: Okay. Anything from defendant?

6                   MR. KELLEHER: No problems with it, Your Honor.

7                   THE COURT: All right. And in terms of time,  
8                   before we argue for a few seconds here this morning, as I  
9                   have it, the plaintiff has an hour and 11 minutes left.  
10                  Defendants have 35 minutes left. You're aware of that?

11                  MR. LINDVALL: Yes.

12                  MR. HOROWITZ: Yes, Your Honor.

13                  THE COURT: You're aware of that, Mr. Kelleher?

14                  MR. KELLEHER: Yes.

15                  THE COURT: I imagine I have at least another  
16                  hour of reading to do, so what I thought I would do, rather  
17                  than make the jury sit through three straight hours  
18                  uninterrupted is, we'll get started as close to 9:00 as we  
19                  can. I will read the instructions through the foreign law  
20                  one, Section 13, and then give them a break, probably,  
21                  hopefully, a shortish break and then try to plow through  
22                  both of the closings and my final instructions and reading  
23                  the verdict sheet and then send them back there with their  
24                  lunch to begin deliberating.

25                  Any questions about any of that?



1 MR. LINDVALL: No, Your Honor.

2 MR. KELLEHER: No, Your Honor.

3 THE COURT: Mr. Kelleher?

4 MR. KELLEHER: No.

5 THE COURT: Okay. Anything else? No? All  
6 right. I'm not going to take the time to bore you with my  
7 ruling on the jury instructions right now. We'll do that  
8 probably when the jury is off deliberating. We'll be in  
9 recess.

10 (Brief recess taken.)

11 \* \* \*

12 (Proceedings reconvened after recess.)

13 THE COURT: Bring the jury in.

14 (Jury returned.)

15 THE COURT: Good morning, ladies and gentlemen.  
16 Welcome back.

17 A JUROR: Good morning.

18 THE COURT: Mr. Looby, before you sit, I'm going  
19 to have him pass out to you more paper. This is the verdict  
20 sheet which will become relevant to you later today. I  
21 wanted you to have that. I will read it to you when I'm  
22 done with all the final instructions which will be after you  
23 hear closing arguments, but you may see it or hear reference  
24 to it during the lawyers' closing arguments so I wanted you  
25 to have your copy, but before we get to closing arguments, I

1 have some instructions to read to you, as you know. So I'm  
2 going to pick up where I left off, at the end of yesterday,  
3 which is page 49.

4 I am at now Section 7.0, entitled Trade Dress  
5 Instructions.

6 7.1 is called Definition of a Trade Dress.

7 Trade dress is the nonfunctional physical detail  
8 and design of a product or its packaging, which identifies  
9 the product's source and distinguishes it from the products  
10 of others.

11 Trade dress is the product's total image and  
12 overall appearance, and may include features such as size,  
13 shape, color, color combinations, texture or graphics. In  
14 other words, trade dress is the form in which a person  
15 presents a product or service to the market, its manner of  
16 display.

17 A trade dress is nonfunctional if, taken as a  
18 whole, the collection of trade dress elements is not  
19 essential to the product's use or purpose or does not affect  
20 the cost or quality of the product even though certain  
21 particular elements of the trade dress may be functional.

22 Trade dress concerns the overall visual impression  
23 created in the consumer's mind when viewing the nonfunctional  
24 aspects of the product and not from the utilitarian or useful  
25 aspects of the product. In considering the impact of the

1 nonfunctional aspects, which are often a complex combination  
2 of many features, you must consider the appearance of features  
3 together, rather than separately.

4 A person who uses the trade dress of another may  
5 be liable for damages.

#### 6 7.2. Functionality.

7 Only nonfunctional trade dress is protectable.

8 The term "functional" has a specific meaning in  
9 trade dress law. Trade dress is not considered "functional"  
10 merely because the trade dress, or its components, perform  
11 useful functions. Thus, for example, all bottles perform  
12 the same function of holding a liquid, but this does not  
13 mean that the specific design chosen for a bottle is  
14 necessarily considered "functional" and unprotectable.

15 A design feature of a product is considered  
16 "functional" and thus unprotectable as trade dress if that  
17 design feature is essential to the use or purpose of the  
18 product or if it affects the cost or quality of the product.  
19 Put another way, a feature is functional if the product  
20 works better because of that particular feature, such as a  
21 shape, texture, color design, et cetera.

22 In determining whether AHG's trade dress is  
23 functional, you should consider the trade dress as a whole.  
24 A trade dress consisting of a combination of features may  
25 be nonfunctional and thus protectable, even though the

1 combination includes functional features that, taken  
2 separately, would not be protectable. However, where the  
3 combination as a whole is functional, the trade dress is not  
4 protectable.

5 7.3. The Plaintiffs' Burden of Proof.

6 In this case, the plaintiffs, AHG, contend that  
7 the defendants, Broetje, has infringed AHG's trade dress.  
8 AHG has the burden of proving by a preponderance of the  
9 evidence that it is the owner of a valid trade dress and  
10 that Broetje infringed that trade dress. Preponderance of  
11 the evidence means that you must be persuaded by the  
12 evidence that it is more probably true than not true that  
13 Broetje infringed AHG's trade dress.

14 7.4. Infringement - Elements and Burden of  
15 Proof - Trade Dress.

16 On AHG's claim for trade dress infringement, AHG  
17 has the burden of proving by a preponderance of the evidence  
18 each of the following elements:

19 1. That the product configuration of AHG's  
20 cassettes has acquired secondary meaning;

21 2. That AHG owns the product configuration of  
22 its cassette as trade dress;

23 3. That the product configuration of AHG's  
24 cassette is nonfunctional; and

25 4. That Broetje used a product configuration

1 for its cassettes that was similar to AHG's product  
2 configuration without AHG's consent in a manner that is  
3 likely to cause confusion among ordinary consumers as to the  
4 source, sponsorship, affiliation, or approval of Broetje's  
5 product configuration.

6 If you find that each of the elements on which  
7 AHG has the burden of proof has been proved, your verdict  
8 should be for AHG. If, on the other hand, AHG has failed to  
9 prove any of these elements, your verdict should be for  
10 Broetje.

11 7.5. Ownership and Priority.

12 One of the things that AHG must prove is that  
13 AHG owns the chrome color of its cassette; the shape and  
14 size of its cassette; the shape, size, color and placement  
15 of the handle; the placement, size and shape of the white  
16 connectors; the clear case cover; and the overall look and  
17 feel of the cassette as trade dress.

18 AHG owns the chrome color of its cassette; the  
19 shape and size of its cassette; the shape, size, color and  
20 placement of the handle; the placement, size and shape of  
21 the white connectors; the clear case cover; and the overall  
22 look and feel of the cassette as a trade dress in the  
23 cassette if AHG used the trade dress in the United States in  
24 a manner that allowed consumers to identify the trade dress  
25 with AHG or its product before the Broetje Parties began to

1 use the current product configuration on their rivet  
2 cassettes.

3 Among the factors you may consider are the  
4 volume of sales of AHG's product, the nature of AHG's sales  
5 and purchasers, the amount of AHG's advertising, and  
6 publicity relating to the product.

7 7.6. Acquired Distinctiveness - Secondary  
8 Meaning.

9 Only distinctive trade dress is protectable;  
10 generic trade dress is not.

11 A "generic" trade dress is a common or general  
12 trade dress for a product whose primary significance to the  
13 consuming public is to identify a class of similar products,  
14 regardless of who sells them. The consuming public consists  
15 of people who may buy or use, or consider buying or using,  
16 the product or similar product, for example, bear-shaped  
17 gummy candies are common in the candy industry and are  
18 generic shapes for this type of candy.

19 You should find that the trade dress at issue  
20 in this case is "distinctive" only if you find that it had  
21 acquired secondary meaning in the United States by the date  
22 the Broetje Parties first sold a product in the United  
23 States that AHG claims infringes that trade dress. I will  
24 now explain to you the idea of "secondary meaning."  
25 Secondary meaning distinguishes the goods it represents from

1 similar goods offered by others and refers to the ability of  
2 trade dress to relay to the public that the product or  
3 service comes from a particular source. Trade dress  
4 acquires secondary meaning when it has been used in such a  
5 way that its primary significance in the minds of  
6 prospective purchasers is not the product itself but the  
7 identification of the product with a particular source. In  
8 addition to your common sense and common experience as  
9 citizens in the community, you may also consider the  
10 following factors in determining whether a particular trade  
11 dress has acquired secondary meaning: (1) AHG's advertising  
12 expenditures, measured primarily with regard to those for  
13 advertisements which highlight the supposedly distinctive,  
14 identifying feature; (2) length of use; (3) exclusivity of  
15 use; (4) the fact of copying; (5) customer surveys; (6)  
16 customer testimony; (7) the use of trade dress in trade  
17 journals; (8) the size of the company; (9) the number of  
18 sales; (10) the number of customers; and (11) actual  
19 confusion.

20 The presence or absence of any particular factor  
21 should not necessarily resolve whether AHG's trade dress had  
22 acquired secondary meaning.

23 AHG has the burden of proving that its trade  
24 dress has had acquired a secondary meaning.

25 The mere fact that AHG may be using its trade

1 dress, or that AHG may have begun using it before Broetje,  
2 does not mean that the trade dress had acquired secondary  
3 meaning. There is no particular length of time that a trade  
4 dress must be used before it acquires secondary meaning.

5 7.7. Likelihood of Confusion.

6 I will suggest some factors you should consider  
7 in deciding likelihood of confusion. The presence or  
8 absence of any particular factor that I suggest should not  
9 necessarily resolve whether there was a likelihood of  
10 confusion, because you must consider all relevant evidence  
11 in determining this. As you consider the likelihood of  
12 confusion you should examine the following:

13 1. Strength or weakness of AHG's trade dress.

14 The more the consuming public recognizes AHG's trade dress  
15 as an indication of origin of AHG's rivet cassettes, the  
16 more likely it is that consumers would be confused about  
17 the source of the Broetje Parties' rivet cassettes if the  
18 Broetje Parties use a similar trade dress;

19 2. Similarity of AHG's trade dress and the

20 Broetje Parties' product configuration. If the overall  
21 impression created by AHG's trade dress is similar to that  
22 created by the Broetje Parties' product configuration, there  
23 is a greater chance that consumers are likely to be confused  
24 by the Broetje Parties' product configuration;

25 3. Similarity of AHG' and the Broetje Parties'



1 goods or services. If the Broetje Parties and AHG market  
2 the same or related kinds of rivet cassettes, there may be a  
3 greater likelihood of confusion about the source of rivet  
4 cassettes than others;

5 4. Actual confusion. If there is evidence of  
6 actual buyer confusion concerning AHG's trade dress and the  
7 Broetje Parties' product configuration, this strongly  
8 suggests a likelihood of confusion. However, AHG need not  
9 produce evidence of actual buyer confusion in order for you  
10 to find that a likelihood of confusion exists;

11 5. The Broetje Parties' intent in adopting  
12 their product configuration. Any evidence that the Broetje  
13 Parties adopted their product configuration with the intent  
14 to cause confusion between their rivet cassettes and AHG's  
15 rivet cassettes should be weighed heavily in favor of a  
16 finding of likelihood of confusion if: (a) the Broetje  
17 Parties' intent to confuse or deceive is demonstrated by  
18 clear and convincing evidence, and (b) the rivet cassettes'  
19 labeling and marketing are also affirmatively deceiving. On  
20 the other hand, any evidence of the Broetje Parties' good  
21 faith in seeking to avoid confusion (including the prominent  
22 use or placement of the Broetje Parties' name or trademark  
23 on its rivet cassettes) should be weighed against a finding  
24 of likelihood of confusion;

25 6. Distribution channels. If AHG's and the

1 Broetje Parties' rivet cassettes are likely to be sold to  
2 the same or similar customers or through the same  
3 distribution channels, this increases the likelihood of  
4 confusion;

5 7. The degree of purchaser care. The more  
6 costly the rivet cassettes, the more sophisticated, careful  
7 and discriminating the buyers are likely to be. Thus,  
8 they may be less likely to be confused by similarities in  
9 AHG's trade dress and the Broetje Parties' product  
10 configuration.

11 8. The length of time the Broetje Parties have  
12 used their product configuration without evidence of actual  
13 confuse arising;

14 9. The extent to which the targets of AHG's and  
15 the Broetje Parties' sales efforts are the same;

16 10. The relationship of the goods in the minds  
17 of consumers because of the similarity of function; and

18 11. Other facts suggesting that the consuming  
19 public might expect AHG to manufacture a product in  
20 Broetje's market, or that AHG is likely to expand into that  
21 market.

22 Although you should consider all of the above  
23 factors as part of making your decision, the above list is  
24 not intended to be exclusive and you should consider any  
25 other factors or evidence that bear on likelihood of

1 confusion.

2 In considering these factors, your general  
3 knowledge, and any other evidence, you should not treat any  
4 single factor as dispositive; nor should you treat this as a  
5 simple mathematical exercise where the party with most of  
6 the above factors in its favor wins. In other words, while  
7 you should consider all the above factors, some factors may  
8 be more important than others in the context of this case.  
9 Thus, you should balance all the above factors and any other  
10 relevant factors or evidence to determine whether, in light  
11 of all the circumstances of this case, consumers are likely  
12 to be confused.

13 Section 8.0 relates to unfair competition.

14 The parties agree that the same standard governs  
15 infringement of an unregistered trade dress as governs the  
16 claim for unfair competition under the same federal statute.  
17 The parties further agree that the same standards govern the  
18 claims for unfair competition in violation of state law.  
19 Therefore, if you find for AHG on its trade dress  
20 infringement claim, you should also find for AHG on its  
21 unfair competition claims. Similarly, if you find for  
22 Broetje on its trade dress infringement claim, you  
23 should also find for Broetje on AHG'S unfair competition  
24 claims.

25 9.0. Intentional interference with prospective

1 economic relations.

2 9.1. Elements of claim.

3 AHG claims that the Broetje Parties  
4 intentionally interfered with an economic relationship  
5 between AHG and third parties that probably would have  
6 resulted in an economic benefit to AHG. To establish this  
7 claim, AHG must prove all of the following:

8 1. That AHG and the third party were in an  
9 economic relationship that probably would have resulted in  
10 an economic benefit to AHG;

11 2. That the Broetje Parties knew of the  
12 relationship;

13 3. That the Broetje Parties engaged in wrongful  
14 conduct through trade dress infringement or patent  
15 infringement;

16 4. That by engaging in this conduct, the  
17 Broetje Parties intended to disrupt the relationship;

18 5. The relationship that was disrupted.

19 6. That AHG was harmed; and

20 7. That the Broetje Parties' wrongful conduct  
21 was a substantial factor in causing AHG's harm.

22 Now we're at Section 10.0, patent damages.

23 10.1 is patent damages generally.

24 I previously instructed you as to the law  
25 governing patent infringement and invalidity. If you find

1       that the Broetje Parties infringed one or more of claims 1,  
2       2, or 6 of the '339 patent, or claims 1 or 2 of the '216  
3       patent, by making, using, selling, or offering for sale any  
4       of their accused products, you must determine the amount of  
5       money damages to be awarded to AHG for the patent  
6       infringement. The amount of damages must be adequate to  
7       compensate AHG for the infringement. If you do not find  
8       patent infringement by the Broetje Parties' accused  
9       products, you will not consider patent damages at all.

10               AHG is entitled to damages that it has proven  
11       with reasonable certainty. On the one hand, reasonable  
12       certainty does not require proof of damages with  
13       mathematical precision. Mere difficulty in ascertaining  
14       damages is not fatal to the patent owner. On the other  
15       hand, the patent owner is not entitled to speculative  
16       damages; that, you should not award any amount for loss,  
17       which, although possible, is remote or left to conjecture or  
18       guess. You may base your evaluation of reasonable certainty  
19       on any evidence, including expert or opinion evidence.

20               AHG has the burden of proving each element of  
21       its damages by a preponderance of the evidence. In other  
22       words, you should award only the amount of lost profits that  
23       AHG establishes that it more likely than not would have  
24       received in profit but for Broetje's infringement of AHG's  
25       patents. The damages award should be based on sound

1 economic proof of the nature of the market.

2 It is not relevant to the question of damages  
3 whether the Broetje Parties benefited from, realized profits  
4 from, or even lost money as a result of the acts of  
5 infringement. The only issue is the amount necessary to  
6 adequately compensate AHG for the Broetje Parties' patent  
7 infringement. Adequate compensation should return AHG to  
8 the position it would have been in had there been no patent  
9 infringement.

10 The fact that I am instructing you as to the  
11 proper measure of damages should not be construed as  
12 intimating any view of the Court as to which party is  
13 entitled to prevail in this case. Instructions as to the  
14 measure of damages are given for your guidance in the event  
15 you find the evidence in favor of AHG.

16 10.2. Date patent damages may begin and end.

17 In this case, for any infringement of the '216  
18 patent that you find, you should begin calculating damages  
19 as of the date AHG first notified the Broetje Parties of its  
20 claim for patent infringement of the '216 patent. The  
21 parties do not agree on that date, and it is up to you to  
22 determine what that date is. AHG must prove that it is more  
23 likely than not that the Broetje Parties actually were  
24 notified of the claim for patent infringement of the '216  
25 patent as of the date alleged by AHG. AHG can give notice

1 of the '216 patent by notifying the Broetje Parties with a  
2 specific claim that the accused products infringed the '216  
3 patent. Such notice starts from the date the Broetje  
4 Parties received the notice. If you find that AHG, before  
5 filing this lawsuit, did not notify the Broetje Parties with  
6 a specific charge that the accused products infringed the  
7 '216 patent, then AHG can only recover damages for  
8 infringement of the '216 patent that occurred after it sued  
9 the Broetje Parties on May 12, 2009.

10 For any infringement of the '339 patent that you  
11 find, you should begin calculating damages as of the date  
12 you find that the Broetje Parties began making, using,  
13 selling, or offering for sale any of the accused products  
14 that infringed any claim of the '339 patent.

15 The date that patent damages end in this case is  
16 the date the '339 patent and the '216 patent expired, which  
17 is December 7, 2009.

18 There are two common methods for computing  
19 damages in a patent infringement case. One is called lost  
20 profits damages and the other is called reasonable royalty  
21 damages. In this case, AHG is seeking only lost profits in  
22 connection with its patent infringement claims. Lost  
23 profits damages compensate the patent owner for the  
24 additional profits it would have made if the accused  
25 infringer had not infringed. You may here this referred to

1 as the but-for test.

2 10.4, entire market value rule.

3 The entire market rule allows for the recovery  
4 of damages based on the value of an entire product  
5 containing several features, even though only one feature is  
6 patented, when the patented feature constitutes the basis  
7 for consumer demand for the product. In other words, a  
8 plaintiff can receive damages for lost sales of non-patented  
9 components where plaintiff proves that the patented feature  
10 drove customer demand for the non-patented components.  
11 Further, the plaintiff must prove that the infringing and  
12 noninfringing components are sold together so that they  
13 constitute a functional unit or are parts of a complete  
14 machine or single assembly of parts. Lastly, the plaintiff  
15 must prove that the individual infringing and noninfringing  
16 components are analogous to a single functioning unit. So,  
17 if you find that AHG has proven by a preponderance of the  
18 evidence that customers demanded Broetje's cassettes because  
19 of the patented features, you may award damages based on the  
20 value of the entire cassette. However, if you find that  
21 customers' demand for Broetje's cassettes is based on  
22 something other than the patented feature, you should award  
23 damages based on the value of the patented features and not  
24 the value of the entire cassette.

25 10.5, patent lost profits -- but-for test.



1 AHG is seeking its lost profits as its patent  
2 damages.

3 AHG must prove the amount of its lost profits.  
4 To recover lost profits for some or all of the infringing  
5 sales, AHG must show by a preponderance of evidence that,  
6 but for the infringement, AHG would have made profits. The  
7 lost profits may be profits that would have resulted from  
8 AHG's sales or a portion of them that the Broetje Parties  
9 made of the accused product. Thus, part of your job is to  
10 determine what the customers who purchased the accused  
11 product from the Broetje Parties would have done if the  
12 alleged infringement had not occurred. The profits I have  
13 been referring to are the profits allegedly lost by AHG, not  
14 the profits, if any, made by the Broetje Parties.

15 10.6, patent lost profits from lost sales (the  
16 Panduit factors).

17 AHG has proven its lost profits if you find that  
18 AHG has proven each of the following factors by a  
19 preponderance of the evidence.

20 1. There was demand for the patented product;

21 2. There was an absence of acceptable  
22 noninfringing substitutes.

23 3. That AHG had the manufacturing and marketing  
24 ability to make all or a part of the infringing sales  
25 actually made by the Broetje Parties; and

1                   4. The amount of profit AHG would have made if  
2 it were not for the Broetje Parties' infringement.

3                   I will now explain each of these factors.

4                   10.7. Lost profits -- demands.

5                   The first Panduit factors asks whether there was  
6 demand for the patented product in the relevant market. AHG  
7 can prove demand for the patented product by showing  
8 significant sales of AHG's own patented product. AHG can  
9 also prove demand for the patented product by showing  
10 significant sales of the Broetje Parties' products that are  
11 covered by the patent-in-suit. To use sales of the Broetje  
12 Parties' products as proof of this demand, however, AHG's  
13 and the Broetje Parties' products must be sufficiently  
14 similar to compete against each other in the same market or  
15 market segment. You should also not consider sales of  
16 products that are mainly due to advertising and marketing,  
17 or due to unpatented features of the products as evidence of  
18 demand for the patented product.

19                   10.8. Lost profits -- acceptable non-infringing  
20 substitutes.

21                   The second factor asks whether there were  
22 noninfringing, acceptable substitutes for the patented  
23 products in the marketplace. If the realities of the  
24 marketplace are that competitors other than AHG would likely  
25 have captured some or all of the sales made by the Broetje

1 Parties, even despite a difference in the products, then AHG  
2 is not entitled to lost profits on those sales.

3 To be an acceptable substitute, the products  
4 must have had one or more of the advantages of the patented  
5 invention that were important to the actual buyers of the  
6 infringing products (not necessarily to the public in  
7 general.) The acceptable substitutes also must not infringe  
8 the patent because they were licensed under the patent or  
9 they did not include all of the features required by the  
10 patent. The acceptable substitutes, in addition, must have  
11 been available during the damages period. An acceptable  
12 noninfringing substitute is available if, during the damages  
13 period, a competitor or the Broetje Parties had all the  
14 necessary equipment, materials, know-how, and experience to  
15 design and manufacture the substitute and sell such  
16 substitute instead of its infringing products at the time  
17 the sales for the infringing products were made. If you  
18 determine that some of the Broetje Parties' customers would  
19 just as likely have purchased a noninfringing acceptable  
20 product, then AHG has not shown it lost those sales but-for  
21 Broetje's sales.

22 Even if you find that AHG's and the Broetje  
23 Parties' products were the only ones with the advantages of  
24 the patented invention, it still remains AHG's burden to  
25 prove that it in fact would have made the Broetje Parties'

1       infringing sales.

2                   10.9. Lost profits -- capacity.

3                   The third factor asks whether AHG had the  
4       manufacturing and marketing ability to actually make the  
5       sales it allegedly lost due to the Broetje Parties'  
6       infringement. AHG must prove that it could have supplied  
7       the additional patented products needed to make the sales  
8       AHG said it lost, or that someone working with AHG could  
9       have supplied the additional patented products. AHG also  
10      must prove that it had the ability to market and sell those  
11      additional patented products.

12                  10.10. Collateral sales -- convoyed or  
13      derivative sales.

14                  In this case, AHG contends that the patented  
15      product is ordinarily sold along with other products, namely  
16      AHG's loading stations, distribution racks, and other parts.  
17      These other products are called collateral products, and the  
18      sales of these types of collateral products are usually  
19      referred to as convoyed sales. Another type of collateral  
20      products is spare or replacement parts. The sales of these  
21      types of collateral products are usually referred to as  
22      derivative sales. It is part of your job to determine if  
23      AHG has proven that it is entitled to damages for the lost  
24      sales of any collateral products.

25                  To recover lost profits for lost sales of any

1 collateral products, AHG must prove two things. First, AHG  
2 must prove that it is more likely than not that it would  
3 have sold the collateral products but-for the infringement.  
4 Second, the collateral products and the patented product  
5 must be so closely related that they effectively act or are  
6 used together for a common purpose. Damages for lost  
7 collateral sales, if any, are calculated in the same way as  
8 for calculating lost profits on the patented product.

9 10.11. Lost profits -- doubts resolved against  
10 infringer.

11 Any doubts that you may have on the issue of  
12 damages due to the Broetje Parties' failure to keep proper  
13 records should be decided in favor of AHG.

14 10.12. Patent damages interest.

15 Neither AHG's nor Broetje's calculations include  
16 interest. Therefore, in arriving at your damages  
17 calculation, you should not consider interest in any way  
18 because it is the function of the Court to award interest.

19 Section 11.0. Non-patent damages.

20 11.1. Damages for trade dress infringement and  
21 unfair competition -- generally.

22 If you find based on the instructions you have  
23 been given that Broetje infringed AHG's trade dress and/or  
24 unfairly competed with AHG, you may award AHG damages in an  
25 amount you determine to be fair and equitable, consisting of

1 the sum of, (1), AHG's actual damages attributable to  
2 Broetje's infringing AHG's trade dress and/or unfair  
3 competition; and (2) Broetje's profits attributable to  
4 infringing AHG's trade dress and/or unfairly competing with  
5 AHG.

6 11.2. Damages for trade dress infringement and  
7 unfair competition -- actual damages.

8 If you find for AHG on its trade dress  
9 infringement claim, you must determine AHG's actual  
10 damages.

11 AHG has the burden of proving actual damages by  
12 a preponderance of the evidence. Damages means the amount  
13 of money which will reasonably and fairly compensate the  
14 plaintiff for any injury you find was caused by defendants'  
15 infringement of the plaintiffs' trade dress.

16 You should consider the following: (1) the  
17 injury to or loss to the plaintiffs' reputation; (2), the  
18 injury to loss of the plaintiffs' goodwill, including injury  
19 to the plaintiffs general business reputation. (3), the  
20 lost profits that the plaintiff would have earned but for  
21 the defendants' infringement; and, (4), the expense of  
22 preventing customers from being deceived.

23 When considering prospective costs, you must not  
24 overcompensate. Accordingly, your award of such future  
25 costs should not exceed the actual damage to the value of

1 the plaintiffs' mark at the time of the infringement by the  
2 defendant.

3 11.3. Damages for trade dress infringement and  
4 unfair competition -- Broetje's profits.

5 In addition to actual damages, the plaintiff is  
6 entitled to any profits earned by the defendant that are  
7 attributable to the infringement, which the plaintiff proves  
8 by a preponderance of the evidence. You may not, however,  
9 include in any award of profits any amount that you took  
10 into account in determining actual damages.

11 Profit is determined by deducting all expenses  
12 from gross revenue. Gross revenue is all of the Broetje  
13 Parties' revenues resulting from using the use of AHG's  
14 trade dress.

15 Expenses are all operating, overhead and  
16 production costs incurred in producing the gross revenue.  
17 The defendant has the burden of proving the expenses and the  
18 portion of the profit attributable to factors other than the  
19 use of the infringed trade dress by a preponderance of the  
20 evidence.

21 Unless you find that a portion of the profit  
22 from the use of AHG's trade dress is attributable to factors  
23 other than the use of the trade dress, you shall find that  
24 the total profit is attributable to the infringement.

25 11.4. Damages for trade dress infringement:

1 Intentional infringement.

2 If you find that Broetje infringed AHG's trade  
3 dress, you must determine whether Broetje used the trade  
4 dress intentionally, showing it was an infringement.

5 11.5. Damages for trade dress infringement and  
6 state unfair competition: Punitive damages.

7 If you decide that the Broetje Parties' conduct  
8 caused AHG harm, you must decide whether that conduct  
9 justifies an award of punitive damages. The purposes of  
10 punitive damages are to punish a wrongdoer for the conduct  
11 that harmed the plaintiff and to discourage similar conduct  
12 in the future.

13 You may award punitive damages against the  
14 Broetje Parties only if AHG proves that the Broetje Parties  
15 engaged in unfair competition, and that the Broetje Parties  
16 did so with malice, oppression, or fraud. To do this, AHG  
17 must prove one of the following by clear and convincing  
18 evidence:

19 1, that the conduct constituting malice,  
20 oppression, or fraud was committed by one or more officers,  
21 directors, or managing agents of the Broetje Parties, who  
22 acted on behalf of the Broetje Parties; or

23 2. That the conduct constituting malice,  
24 oppression, or fraud was authorized by one or more officers,  
25 directors, or managing agents of the Broetje Parties; or



1                   3, that one or more officers, directors, or  
2     managing agents of the Broetje Parties knew of the conduct  
3     constituting malice, oppression, or fraud and adopted or  
4     approved that conduct after it occurred.

5                   Malice means that the Broetje Parties acted with  
6     intent to cause sir gee or that the Broetje Parties' conduct  
7     was despicable and was done with a willful and knowing  
8     disregard for AHG's rights. A person acts with knowing  
9     disregard when he or she is aware of the probable harmful  
10    consequences of his or her conduct and deliberately fails to  
11    avoid those consequences. Oppression means that the Broetje  
12    Parties' conduct was despicable and subjected AHG to cruel  
13    and unjust hardship in knowing disregard of AHG's rights.  
14    Despicable conduct is conduct that is so vial, base, or  
15    contemptible that it would be looked down on and despised by  
16    reasonable people. Fraud means that the Broetje Parties  
17    intentionally misrepresented or concealed a material fact  
18    and did so intending to harm AHG.

19                  An employee is a managing agent if he or she  
20    exercises substantial independent authority and judgment in  
21    his or her corporate decision-making such that his or her  
22    decisions ultimately determine corporate policy.

23                  There is no fixed formula for determining the  
24    amount of punitive damages, and you are not required to  
25    award any punitive damages. If you decide to award punitive

1 damages, you should consider all of the following factors in  
2 determining the amount:

3 (a) how reprehensible was the Broetje Parties'  
4 conduct? In deciding how reprehensible the Broetje Parties'  
5 conduct was, you may consider, among other factors:

6 1. Whether the Broetje Parties' conduct  
7 involved a pattern or practice; and.

8 2. Whether the Broetje Parties acted with  
9 trickery or deceit.

10 (b). Is there a reasonable relationship between  
11 the amount of punitive damages and AHG's harm?

12 (c). In view of the Broetje Parties financial  
13 condition, what amount is necessary to punish it and  
14 discourage future wrongful conduct? You may not increase  
15 the punitive award above an amount that is otherwise  
16 appropriate merely because the Broetje Parties have  
17 substantial financial resources. Any award you impose may  
18 not exceed the Broetje Parties' ability to pay.

19 Punitive damages may not be used to punish the  
20 Broetje Parties for their impact of their alleged misconduct  
21 on persons other than AHG.

22 11.6. Statute of limitations: Trade dress  
23 infringement.

24 The Broetje Parties contend that AHG's lawsuit  
25 was not filed within the time set by law. I instruct you

1 that you can only find the Broetje Parties liable for trade  
2 dress infringement that AHG proves occurred after May 12,  
3 2006. You cannot find the Broetje Parties liable for any  
4 trade dress infringement that may have occurred before May  
5 12, 2006.

6 11.7. Statute of limitations: Trade dress  
7 infringement -- delayed discovery.

8 If the Broetje Parties prove that AHG's claimed  
9 harm occurred before May 12, 2006, AHG's lawsuit was still  
10 filed on time if AHG proves that before that date, AHG did  
11 not discover, and did not know of facts that would have  
12 caused a reasonable person to suspect, that it had suffered  
13 harm in the United States that was caused by machines  
14 wrongful conduct.

15 11.8. Statute of limitations: Federal law  
16 unfair competition.

17 The Broetje Parties contend that AHG's lawsuit  
18 was not filed within the time set by law. I instruct you  
19 that you can only find the Broetje Parties liable for unfair  
20 competition under federal law for unfair competition that  
21 AHG proves occurred after May 12, 2006. You cannot find the  
22 Broetje Parties liable for any federal unfair competition  
23 that may have occurred before May 12, 2006.

24 11.9. Statute of limitations: Federal law  
25 unfair competition -- delayed discovery.

1           If the Broetje Parties prove that AHG's claimed  
2   harm occurred before May 12, 2006, AHG's lawsuit was still  
3   filed on time if AHG proves that, before that date, AHG did  
4   not discover, and did not know of facts that would have  
5   caused a reasonable person to suspect, that it had suffered  
6   harm in the United States that was caused by someone's  
7   wrongful conduct.

8           11.10. Statute of limitations: State law  
9   unfair competition (state law).

10          The Broetje Parties contend that AHG's lawsuit  
11   was not filed within the time set by law. I instruct you  
12   that you can only find the Broetje Parties liable for trade  
13   dress infringement that AHG proves occurred after May 12th,  
14   2007. You cannot find the Broetje Parties liable for any  
15   trade dress infringement that may have occurred before May  
16   12, 2007.

17          11.11. Statute of limitations: State law  
18   unfair competition -- delayed discovery.

19          If the Broetje Parties prove that AHG's claimed  
20   harm occurred before May 12, 2007, AHG's lawsuit was still  
21   filed on time if AHG proves that before that date, AHG did  
22   not discover, and did not know of facts that would have  
23   caused a reasonable person to suspect, that it had suffered  
24   harm in the United States that was caused by someone's  
25   wrongful conduct.

1                   11.12. Damages for intentional interference  
2 with prospective economic advantage: Generally.

3                   If you decide that AHG has proved its claim  
4 against the Broetje Parties, you also must decide how much  
5 money will reasonably compensate AHG for the harm. This  
6 compensation is called damages.

7                   The amount of damages must include an award for  
8 each item of harm that was caused by the Broetje Parties'  
9 wrongful conduct, even if the particular harm could not have  
10 been anticipated.

11                  AHG does not have to prove the exact amount of  
12 damages that will provide reasonable compensation for the  
13 harm. However, you must not speculate or guess in awarding  
14 damages.

15                  The following are the specific items of damage  
16 claimed by AHG are:

17                         1, lost profits; and

18                         2. Punitive damages.

19                   11.13. Damages For Intentional Interference  
20 With Prospective Economic Advantage - Compensatory Damages.

21                  As compensatory damages, AHG claims lost profits  
22 that AHG allegedly would have earned but for Broetje's  
23 intentional interference with AHG's prospect ticket economic  
24 advantage with third party customers. To recover damages  
25 for lost profits, AHG must prove it is reasonably certain

1 that it would have earned profits but-for Broetje's conduct.

2 To decide the amount of damages for lost  
3 profits, you must determine the gross amount AHG would have  
4 received but-for Broetje's conduct and then subtract from  
5 that amount the expenses AHG would have had if Broetje's  
6 conduct had not occurred.

7 The amount of lost profits need not be  
8 calculated with mathematical precision, but there must be a  
9 reasonable basis for computing the loss.

10 11.14. Damages For Intentional Interference  
11 With Prospective Economic Advantage: Punitive Damages.

12 If you decide that the Broetje Parties' conduct  
13 caused AHG harm, you must decide whether that conduct  
14 justifies an award of punitive damages. The purposes of  
15 punitive damages are to punish a wrongdoer for the conduct  
16 that harmed the plaintiff and to discourage similar conduct  
17 in the future.

18 You may award punitive damages against the  
19 Broetje Parties only if AHG proves that the Broetje Parties  
20 engaged in intentional interference with prospective  
21 economic advantage; and that the Broetje Parties did so with  
22 malice, oppression, or fraud. To do this, AHG must prove  
23 one of the following by clear and convincing evidence:

24 1. That the conduct constituting malice,  
25 oppression, or fraud was committed by one or more officers,

1 directors, or managing agents of the Broetje Parties, who  
2 acted on behalf of the Broetje Parties; or

3 2. That the conduct constituting malice,  
4 oppression, or fraud was authorized by one or more officers,  
5 directors, or managing agents of the Broetje Parties; or.

6 3. That that one or more officers, directors,  
7 or managing agents of the Broetje Parties knew of the  
8 conduct constituting malice, oppression, or fraud and  
9 adopted or approved that conduct after it occurred.

10 "Malice" means that the Broetje Parties acted  
11 with intent to cause injury or that the Broetje Parties'  
12 conduct was despicable and was done with a willful and  
13 knowing disregard for AHG's rights. A person acts with  
14 knowing disregard when he or she is aware of the probable  
15 harmful consequences of his or her conduct and deliberately  
16 fails to avoid those consequences.

17 "Oppression" means that the Broetje Parties'  
18 conduct was despicable and subjected AHG to cruel and unjust  
19 hardship in knowing disregard of AHG's rights. "Despicable  
20 conduct" is conduct that is so vile, base, or contemptible  
21 that it would be looked down on and despised by reasonable  
22 people. "Fraud" means that the Broetje Parties  
23 intentionally misrepresented or concealed a material fact  
24 and did so intending to harm AHG.

25 An employee is a "managing agent" if he or she

1 exercises substantial independent authority and judgment in  
2 his or her corporate decision-making such that his or her  
3 decisions ultimately determine corporate policy.

4 There is no fixed formula for determining the  
5 amount of punitive damages, and you are not required to  
6 award any punitive damages. If you decide to award punitive  
7 damages, you should consider all of the following factors in  
8 determining the amount:

9 (a) How reprehensible was the Broetje Parties'  
10 conduct? In deciding how reprehensible the Broetje Parties'  
11 conduct was, you may consider, among other factors:

12 1. Whether the Broetje Parties' conduct  
13 involved a pattern or practice; and

14 2. Whether the Broetje Parties acted with  
15 trickery or deceit.

16 (b) Is there a reasonable relationship between  
17 the amount of punitive of damages and AHG's harm?

18 (c) In view of the Broetje Parties' financial  
19 condition, what amount is necessary to punish it and  
20 discourage future wrongful conduct? You may not increase  
21 the punitive award above an amount that is otherwise  
22 appropriate merely because the Broetje Parties have  
23 substantial financial resources. Any award you impose may  
24 not exceed the Broetje Parties' ability to pay.

25 Punitive damages may not be used to punish the



1 Broetje Parties for the impact of their alleged misconduct  
2 on persons other than AHG.

3 11.15. A Statute of Limitations: Intentional  
4 Interference With Prospective Economic Advantage.

5 The Broetje Parties contend that AHG's lawsuit  
6 was not filed within the time set by law. To succeed on  
7 this defense, the Broetje Parties must prove that each of  
8 AHG's claimed harms occurred before May 12, 2007.

9 11.16. Statute of Limitations: Intentional  
10 Interference With Prospective Economic Advantage - Delayed  
11 Discovery.

12 If the Broetje Parties prove that AHG's claimed  
13 harm occurred before May 12, 2007, AHG's lawsuit was still  
14 filed on time if AHG proves that before that date, AHG did  
15 not discover, and did not know of facts that would have  
16 caused a reasonable person to suspect that it had suffered  
17 harm in the United States that was caused by someone's  
18 wrongful conduct.

19 Page 93. 11.17. No Duplicative Damages -  
20 Nonpatent Damages.

21 AHG seeks damages from the Broetje Parties under  
22 more than one legal theory. However, each item of damages,  
23 except punitive damages, may be awarded only once,  
24 regardless of the number of legal theories alleged.

25 You will be asked to decide whether the Broetje

1 Parties are liable to AHG under the following legal  
2 theories:

- 3 1. Trade dress infringement;
- 4 2. Federal law unfair competition;
- 5 3. State law unfair competition;
- 6 4. Intentional interference with prospective  
7 business advantage.

8 The following items of compensatory damages are  
9 recoverable only once whether under one or more of the  
10 foregoing:

- 11 1. AHG's damages;
- 12 2. The Broetje Parties' profit resulting from  
13 the infringement.

14 In other words, the total compensatory damages  
15 award for trade dress infringement, federal unfair  
16 competition, state law unfair competition, and intentional  
17 interference with prospective business advantage,  
18 individually or in any combination, cannot exceed the total  
19 of all of AHG's damages plus all of the Broetje Parties'  
20 profits.

21 Punitive damages, if you determine that AHG is  
22 entitled to them, should be awarded separately from the  
23 compensatory damages.

24 12.0. Closing Statement - Damages.

25 The fact that I have instructed you regarding

1 damages should not be construed as suggesting which party is  
2 to prevail in this case. Instructions regarding damages are  
3 given for your guidance in the event that the evidence leads  
4 you to find in favor of AHG.

5 13.0. Foreign Law.

6 You have heard evidence about legal proceedings  
7 involving some of the parties to this lawsuit that have  
8 occurred and may be ongoing in France and Germany. Be  
9 mindful, however, that the laws in France and Germany are  
10 different than the laws in the United States. For example,  
11 the procedures for determining patent infringement and  
12 patent invalidity are different in France and Germany than  
13 they are in the United States. Additionally, the patents  
14 at issue in France and Germany are not the same patents at  
15 issue in this case.

16 The evidence of foreign legal proceedings was  
17 introduced to provide you background as to the parties'  
18 relationship. You might also find this evidence to be  
19 relevant to Broetje's knowledge of the patents in suit and  
20 intent, which you may find to be relevant to AHG's claims  
21 for induced infringement, contributory infringement, and  
22 willful infringement.

23 Similarly, be mindful that any foreign decision  
24 with respect to trade dress infringement or the contractual  
25 relationship between the parties was also not based on

1 United States law and AHG is not asserting a breach of  
2 contract claim here. Although the foreign decisions may  
3 provide you with helpful background information, your duty  
4 with respect to all of the issues before you is to apply the  
5 law as I have instructed you to the facts as you find them  
6 based solely on the evidence presented here in court.

7 That's all I'm going to read to you for now.  
8 I'm going to save the last few pages to read after you hear  
9 closing argument. And because of the time allotted for  
10 closing argument, it makes the most sense to give you a very  
11 short break now. This will be hopefully your last break.  
12 It will be your morning break. No talking about the case  
13 yet. When we get you back here shortly, we will hear  
14 closing arguments.

15 (Jury left courtroom.)

16 THE COURT: All right. We will be checking in  
17 with the jury in approximately 10 minutes. And if they're  
18 ready to go, we'll be back in. We will be in recess.

19 (Brief recess taken.)

20 \* \* \*

21 (Proceedings reconvened after recess.)

22 THE COURT: All right. The jury is ready. We  
23 will give each side a ten minute and two minute warning, if  
24 you get to that point on your time limit.

25 We'll bring the jury in.

1 (Jury returned.)

2 THE COURT: All right. Ladies and gentlemen,  
3 I'll now call on AHG for closing argument. Mr. Lindvall.

4 MR. LINDVALL: Thank you, Your Honor.

5 First, I want to sincerely thank you for  
6 spending a week with us. I know you had a lot better things  
7 to do than spend it here in the courtroom, but I know my  
8 client, clients, and I know Mr. Bornes appreciates your  
9 service. It gives them their day in court, so to speak.

10 Before I begin talking about what I will, what I  
11 want you to understand, you are going to hear a lot of  
12 attorney argument. You are going to hear it from me, and  
13 you are going to hear it from my opponent. As the Judge has  
14 instructed you, attorney argument is just that, it is not  
15 evidence.

16 What you are supposed to do is look at the  
17 evidence. I want you to look at the documents and the trial  
18 testimony that I'm going to show you today. And when you  
19 see the trial testimony and the documents, I am sure you  
20 will be convinced that not only did Broetje infringe the  
21 patents, infringe the trade dress in this situation, but  
22 they did it with malice. They did it willfully and  
23 intentional. And I'm going to show you evidence. I'm not  
24 just going to tell you this. I'm going to show you  
25 documents and testimony we pulled from the trial transcript

1 to show you we proved our case.

2 What I will do, as we go through, I will point  
3 out to you certain of the exhibit numbers because when you  
4 go back to the juryroom, you will have the exhibits,  
5 including even these cassettes, and you will be able to look  
6 at these in the juryroom.

7 Okay. The first part, like I just said. This  
8 case, just like I said in my opening statement, this case is  
9 about deliberate copying. And it's almost there is no  
10 dispute about that. Now, they may try to take the position  
11 that we copied them. We think such a position, of course,  
12 is outrageous that they possibly think we copied them.

13 But anyway, we have some very clear documents  
14 they copied us on this. I really don't think that is an  
15 issue that can be disputed here.

16 As you can see, we have the cassettes, which you  
17 have seen over and over again, and you can see the tube  
18 profile of both pentagons.

19 They could have picked a multitude of shapes  
20 other than a pentagon shape but they didn't. Why? Because  
21 we already optimized it. We already figured out the  
22 pentagon was the best shape, as Mr. Bornes testified that  
23 he spent several years coming up with this invention and  
24 optimize it to where the pentagon shape is the best shape.

25 The other aspect is the willful infringement of

1 AHG's patent. They had known about our patent, and we'll  
2 show you this, or existence of foreign patents at least  
3 since the signing of the contract back in 1994. And  
4 Dr. Budach did not give a written opinion, if we can call  
5 it an opinion, we'll talk about that later, until 2005. So  
6 you can count how many years went by without any opinion  
7 whatsoever.

8 Now, they didn't start their own development  
9 until 2003 but they still waited several years until we  
10 raised the issue in the German litigation and then they went  
11 out and got an opinion. Again, that is something to talk  
12 about later on.

13 All right. Let's briefly go to what was their  
14 state of mind at the time? Can you go to the next slide,  
15 please?

16 This kind of says it all. This is Dr. Budach's  
17 opinion. This is DTX-1605. That is the exhibit number.  
18 And Dr. Budach's opinion is at the very end, and you can  
19 pick up the opinion and read it yourself.

20 They have an option here. We don't know whether  
21 they took the option or not, but they have an option here.  
22 Their policy is not we will never infringe a patent, their  
23 policy is we will infringe a patent if we get internal  
24 management approval. And all that takes is to discuss  
25 briefly by phone beforehand, whether that is even necessary

1 here.

2 Do you believe Dr. Budach whether they did that  
3 or not? I don't know. That is for you to decide. But he  
4 makes it clear we think within CLAAS and within Broetje they  
5 had the option to infringe deliberately. And all it took  
6 was a brief phone call to CLAAS's internal management.

7 So that kind of sets the stage, the state of  
8 mind how Broetje thinks and what they would allow to happen  
9 back in this time frame.

10 Now, let's go to PDX-204, please.

11 It kind of all starts -- and what I'm going to  
12 do is give you kind of a highlight first and I will go back  
13 to my timeline I used in my opening statement. It starts in  
14 2002.

15 And can we put up JTX-66, please?

16 And I know you have seen this e-mail over and  
17 over again. This is the e-mail. JTX-66 is the e-mail from  
18 Mr. Maylander, and it's dated June 18, 2002.

19 And the subject is: Our meeting from last week.

20 Dear Mr. Bornes,

21 I have informed Mr. Holtmeier -- remember he was  
22 the general manager, like the CEO of Broetje at the time --  
23 about your activities at Gemcor.

24 Let's talk about that again. You heard a lot  
25 about this now. What happened was Mr. Bornes, for whatever



1 reason, felt obligated to act in good faith. He went up  
2 to Mr. Maylander and said, AHG is now considering selling  
3 to Gemcor. He didn't have an obligation to tell that to  
4 Mr. Maylander but he did it. He felt that was the way you  
5 conduct business.

6 If I'm going to sell to one of the competitors,  
7 I'm going to tell them just so they have some notice.

8 Obviously, you see how the reaction is. The  
9 reaction is they were extremely disappointed and very  
10 unhappy that they were going to deal with Broetje's main  
11 competitor.

12 It kind of set the stage. Broetje was upset now  
13 that AHG was going to do this. Again, Mr. Bornes is not  
14 concealing any facts here. He told them in a meeting that  
15 we're going to deal with Gemcor. You recall from the  
16 contract we were perfectly within our rights to do that.  
17 We're going to sell to some other companies. What is wrong  
18 with that?

19 Okay. So let's go to PDX-207.

20 So 2002. So what happens? About a little less  
21 than a year comes by and internally they make a decision.  
22 And this document I think is a real very key document in  
23 this case. It's JTX-14.

24 This is the copy document. This is the document  
25 where internally they took our cassette, a rack, our loading

1 station. There are photographs all over it in there,  
2 including detailed photographs. And that is where they did  
3 the development, they actual copied our product, and you can  
4 pick that exhibit up yourself and you will see it, and you  
5 will see all kinds of photos in there, and you will see the  
6 testimony later on where he said that is the only example  
7 they used. And lo and behold, you say see what came out is  
8 basically an exact replica of what they have done. So that  
9 is what they did.

10 Now, did they tell Mr. Bornes that they were  
11 going to do this? No. There is no testimony whatsoever in  
12 the record that they ever told Mr. Bornes, you know what?  
13 If you're going to deal with Gemcor, we're going to develop  
14 our own cassette. They kept it quiet instead of saying they  
15 were going to develop their own. There is no testimony  
16 whatsoever.

17 So the title of this document, and that's by  
18 testimony, is Development of Innovative Rivet Feeding  
19 Technique. That's the title of the whole thing. That's an  
20 internal document again.

21 If we can turn to the next page, please.

22 Here is some trial testimony. What I'm going to  
23 do today is show you trial testimony. This is actually from  
24 the testimony transcript, and you see I actually cite to the  
25 transcript. Obviously, you don't remember everything but we

1       tried to pull out snippets so you can see the impact.

2                   And this is a Broetje employee, Mr. Neugebauer.

3                   And I said:

4                   "Question: Let's look at page 19 of this  
5 document."

6                   This document here.

7                   "Answer: That is an AHG cassette as an  
8 example."

9                   That's what he answers. Used as an example.

10                  "Question: You said AHG cassettes is in there.  
11 There is no other example in this complete development  
12 document other than an AHG as an example. Correct?

13                  "Answer: Yes."

14                  In other words, you pick this document up, the  
15 only thing you see in there is basically detailed study of  
16 AHG's product, and they're taking it and looking at it and  
17 figuring out how to copy this.

18                  Turn to the next slide, please.

19                  Now here is the trial testimony from Dr. Peters  
20 who is the chief operating officer of the company.

21                  And he says:

22                  "Question: Do you know why this -- AHG's rivet  
23 cassette is being shown in Broetje's internal documentation  
24 relating to its development of its own cassette?

25                  "Answer: Because it's an example of the rivet

1 cassette.

2 "Question: And why would there be an example of  
3 a rivet cassette shown?

4 "Answer: Because you want to develop your own  
5 system. Because we wanted to develop our own system."

6 In other words, they didn't go from scratch and  
7 say you know what? There is a lot of faults with our  
8 product. It's no good. We don't like it. It's not  
9 technically feasible. There are lots of problems. Let's  
10 start and develop our own system.

11 If there are all these faults with this cassette  
12 like they said there are, why did they copy it? Why did  
13 they use this as an example. You would think that with all  
14 these fault reports, they would say no, forget about theirs.  
15 Let's start from scratch. We're great engineers. We don't  
16 need to use theirs as an example because we know it doesn't  
17 work. That's according to their testimony. So let's start  
18 with a whole different system.

19 You see companies like ElectroImpact had come up  
20 with a system, and they claimed that it's even working by  
21 now. We dispute that, but they could have come up with  
22 their own unique design.

23 In fact, their cassette was so close to ours,  
24 they could take their cassette that they designed from the  
25 internal documents and stick it in our racks and it would

1 work. In fact, that's what you see in factories even today:  
2 their cassette in our racks. That is how closely they  
3 copied, the dimensions and everything else.

4 And the last part. Dr. Peters again.

5 "Question: And in developing your own system,  
6 you used as an example of developing your own system AHG's  
7 own product; correct?

8 "Answer: Yes."

9 So it's undisputed, once this document was shown  
10 to them, that they copied it. They used it as an example.

11 There wasn't one time that they put a witness up  
12 in the last four days to explain this document. You never  
13 saw one of their witnesses come up and explain this  
14 document. The only time you saw this document arise is when  
15 we cross-examined them on it. They ran away from this  
16 document, and there is a reason for that.

17 Now, let's go back to PTX-205, please, Jeff.

18 Pardon me.

19 This is a point that is extremely important in  
20 this case. You heard the Judge's instructions about  
21 punitive damages and intentional concealment and malice.  
22 This is where it is. This is a very important point to  
23 understand.

24 This is PTX-657. This is the e-mail.

25 If you could pull up the actual e-mail. I like

1 to show the actual evidence instead of slides because  
2 sometimes slides can be tricky on this. But this is the  
3 actual e-mail. And this is the part of the e-mail with the  
4 "PS." This is from Mr. Neugebauer again. And this is  
5 dated, if my French is right, July 2003.

6 And this is the part right here (indicating).

7 Now, remember the internal document, we showed  
8 the copy document, I call it, JTX-14? That is dated in June  
9 of 2003. So they had already created that document, made a  
10 decision. They had already made a decision to create their  
11 own cassette and their own rack and loading system. They  
12 already made the decision in June 2003. Okay? So that  
13 decision has been made. The ship sailed on that one.

14 But a month later, an e-mail was sent to  
15 Phillippe Bornes saying: Just between you and me, the  
16 company is very, very deeply "unsatisfied" concerning to the  
17 situation with Gemcor.

18 Again, like Mr. Maylander's e-mail: Why are you  
19 dealing with our main competitor? Because they realize this  
20 AHG cassette system is going to give Gemcor not only, well,  
21 maybe an advantage but it will put them on the same par in  
22 the competition between Boeing and what have you for their  
23 systems because then Gemcor can say, well, we have the AHG  
24 system also, so Broetje doesn't have that extra edge over  
25 Gemcor. Obviously, Broetje does not want Gemcor to have

1       that edge.

2                   So just between you and me, the company is very,  
3       very deeply "unsatisfied" concerning to the situation with  
4       Gemcor. There are several discussions in-house, also with  
5       our mother company" -- that is CLAAS, if you remember --  
6       "how to react on that obstacle."

7                   Well, guess what? They had already figured out  
8       how to react. They started development a month earlier.  
9       Remember, I questioned Mr. Neugebauer and I told him that is  
10      not the truth, is it? And he admitted it was an untruth.  
11      And I will show you the testimony, the actual testimony.  
12      And he says he does untruths like this to pressure people.  
13      He is trying to pressure Mr. Bornes.

14                  Did he tell Mr. Bornes in this e-mail, oh, by  
15      the way, we already made a decision a month ago we already  
16      started development of our cassette? No. He didn't tell  
17      Mr. Bornes anything.

18                  Mr. Bornes was up front. He was very candid.  
19      He said you know what? We're going to deal with Gemcor.  
20      I'm going to give you a heads up. What do they do? You can  
21      see right here.

22                  So what they're doing, they're basically telling  
23      Mr. Bornes quit dealing with Gemcor, and behind his back  
24      what are they doing? They're developing their own cassette.  
25      What do they gain out of that? A huge advantage. They

1       concealed the fact from Mr. Bornes that they are developing  
2       their own cassette that gives them a business advantage --  
3       a huge business advantage because that means AHG says,  
4       okay, well, we'll stay with you, Broetje, and we won't  
5       sell to Gemcor. And, sure enough, behind his back they're  
6       developing a cassette. Once they come out with the  
7       cassette, AHG is stuck with nothing. That is exactly what  
8       they wanted basically.

9               So now Broetje has got a fully developed system,  
10       AHG doesn't have any customers, and that is it. So there is  
11       no more AHG. Gemcor won't have AHG but there is Broetje and  
12       they have their own system.

13              The only way you can explain this is because  
14       he was the program manager who testified he was part of  
15       that team developing the cassette, and a month after the  
16       development document came out, he is trying to tell Mr.  
17       Bornes we haven't made a decision but we are very upset.  
18       They had already made a decision.

19              And it says right here. It says: "It seems to  
20       be that there is the possibility that we will quit the  
21       relationship with you."

22              There is not a possibility. They have already  
23       decided. That is a lie.

24              "You should really think about a possible  
25       solution."



1           In other words, he is saying stay with us, wink  
2           wink. Forget about Gemcor, say you can't work with them and  
3           we'll continue to develop. It's a pretty good track record.  
4           It's very deceitful. Very deceitful.

5           Let's go to the next slide of PDTX-206, please.

6           Here is some trial testimony from Mr. Neugebauer.  
7           Again, I'm trying to show you just evidence, not just fancy  
8           slides.

9           "Question: So you are basically telling  
10          Mr. Bornes you better quit selling to Gemcor or we are going  
11          to make our own cassette or we are going to do something  
12          else. Correct?

13          "Answer: In principle, yes, that's right."

14          So he is telling him quit dealing with Gemcor or  
15          else. We all know. They weren't designing their own thing.

16          Now, the interesting thing about his whole  
17          testimony, he doesn't say -- well, what is interesting is  
18          they brought up these fault reports. You remember these  
19          things, that they called our product, you know, get rid of  
20          our product, it's got all these faults.

21          Why are they playing these games with us? Why  
22          they don't they say: Mr. Bornes, you don't have a good  
23          product. We don't want your product anymore. Sell it to  
24          Gemcor. In fact, that will give us a tactical advantage  
25          because there are so many faults with this cassette, if you

1 give it to Gemcor, then Gemcor, they'll have to deal with  
2 it then and we'll have the business.

3 No, they weren't doing that. They knew there an  
4 advantage of having the AHG system.

5 If I was in business and I wanted to destroy the  
6 other side, to do damage to another competitor and I knew a  
7 product I could get them to start buying, it's no good, that  
8 would be the perfect solution. So I would promote them to  
9 sell it to Gemcor if it was such an inferior product as they  
10 claim.

11 Now, let's turn to PDX-211.

12 Now, here is another document I wanted you to  
13 see. This document is JTX-8. And that is the source.  
14 JTX-8. If you can pull up the document again. Pull up the  
15 document, please. JTX-8.

16 Okay. The testimony was this is a presentation  
17 to customers. So when they go to customers, this is a  
18 document they use for presenting to customers and describing  
19 the product.

20 And if we go to the last page.

21 Do you see what they have here? There is  
22 testimony, and everybody realized that is an AHG cassette.  
23 Where is the logo?

24 They take the logo out. Why? Because obviously  
25 they want to conceal the AHG. This is a presentation to the

1 customers.

2 If we could go back a slide, please.

3 And you see here the trial testimony of the  
4 President of Broetje USA. It says:

5 "Question: That's an AHG and F2C2 cassette, is  
6 it not.

7 "Answer: Yes, it is.

8 And he is pointing to the cassette I just showed  
9 you.

10 "Question: In this presentation, you whited out  
11 or somebody whited out AHG/F2C2, did they not?

12 "Answer: I can't speak to whether or not it was  
13 whited out or not."

14 He can see it was whited out.

15 "Question: Well, you don't see it in the  
16 picture, do you?

17 "Answer: No, I don't see it in the picture."

18 You are going to see this theme through this  
19 testimony. I'm going to show you more testimony where they  
20 basically try not to -- they don't want to admit anything  
21 but they can't address a lot of these different situations.  
22 It's kind of like the copy document where they never put a  
23 witness up there to explain that document.

24 Excuse me. (Taking a sip of water.)

25 Okay. Let's go to PDX-212, please.

1                   Now, I'm not going to make a big deal about the  
2 French court decision and German court decision. I know my  
3 opponent may or may not. But there is one interesting  
4 relevancy about this. Okay? And the reason why we bring it  
5 up is because of this (picking up Broetje red cassette).  
6 And that is really why we are bringing it up. We're not  
7 saying that you should follow the French court and say that  
8 is the law. You heard the Judge instruct you that French  
9 law and German law are different than U.S. law. And nobody  
10 disputes that in this courtroom.

11                   What the relevancy about this aspect goes to  
12 this intent. Okay? Once they develop their own system,  
13 they continued to make it look like ours (picking up AHG  
14 chrome cassette).

15                   Same handle, exact same handle, same chrome  
16 color, some small differences, we have a clearer side, but  
17 they're really insignificant when you look at them. What  
18 could they have done all along if they wanted to not confuse  
19 anybody out here? They could have done this (picking up  
20 Broetje red cassette).

21                   In fact, you will see Dr. Peters. In a minute I  
22 will show his testimony. He says there is no functional  
23 change. He says this cassette operates just like their old  
24 one. The only changes are nonfunctional changes. That  
25 means the color, the metal, the handle shape, the color of

1 the handle, all of this.

2 The window now is smaller. Prominent display of  
3 their logo. It looks different now. This doesn't infringe.  
4 I agree it doesn't infringe. We don't take a position this  
5 infringes.

6 Why didn't they do this when they first  
7 developed it? And then, you know, no one could possibly be  
8 confused. Everybody would say, oh, that is definitely a  
9 Broetje product because it looks a lot different than AHG.  
10 But they waited until 2000 -- well, it's still even not out  
11 today. It's going to be out any day according to their  
12 testimony but they waited until just recently to do this,  
13 and it took AHG and F2C2 all these resources and go to  
14 France, come here, wherever they have to go, to try to  
15 enforce their rights and make it right from a wrong.

16 Okay. Let's go quickly to the timeline.

17 PDTX-274, please, Jeff.

18 Okay. Remember this timeline from my opening  
19 statement? And I want to briefly kind of go over the  
20 timeline from here.

21 You recall that Mr. Bornes in 1986 and his  
22 father-in-law Jean-Marc worked for about approximately a  
23 couple years to develop their invention here, which is how  
24 to dispense and store many, many, many rivets, and they  
25 were solving an age old problem about avoiding getting

1 foreign material in these big vibrating bowls which I will  
2 show you in a minute. And it took them awhile.

3 They didn't work 24/7 on it, but they worked  
4 hard to get a solution because there hadn't been a  
5 successful solution up to that point in time, and they did  
6 get a successful solution, and they ultimately were issued  
7 two U.S. patents which were the '216 and '339 patents.

8 But now we go to the 1994 and Broetje and AHG  
9 enter into a contract. You recall once we got these  
10 patents, there a beginning of a to-and-fro from Broetje and  
11 AHG. Broetje wanted to use our system. We went back and  
12 forth negotiating. We finally came to an agreement in the  
13 contract, and the contract is between Broetje and AHG.

14 Now, recall that AHG themselves, just to put  
15 them in context. AHG is a small family-owned company and  
16 F2C2 is a wholly owned subsidiary of AHG. The testimony of  
17 Mr. Bornes was it had four or five employees at the time.  
18 Very small, family-owned business. Very successful in what  
19 they were doing.

20 Now, if we could go to PTDX-214, please.

21 The problem they were solving is we had these  
22 big vibrator bowls. This one was hooked up to a loading  
23 machine, but they had these standalones in the factories,  
24 but what would happen is with foreign materials or rivets  
25 that weren't supposed to belong in there, racks, that they

1 found their way in there, and they went right up into the  
2 rivet machine and jammed the rivet machine or caused some  
3 problem and shut down the production and it costs a lot of  
4 money. You heard testimony about that. And that was a  
5 problem so you had to avoid that.

6 What they did to avoid that is that created a  
7 situation where you could have a cassette like this  
8 (indicating) with tubes in it and put lots of rivets in it.  
9 But when they did that originally with the tube, we had  
10 jamming. So they spent time trying to figure out how  
11 they're going to get all these rivets, thousands of these  
12 rivets in tubes to move through with compressed air without  
13 jamming.

14 It seems, you know, hindsight is always 20/20,  
15 but at the time it was a difficult situation, it was a  
16 difficult problem. They came up with this solution that  
17 talked about the grooves, and they came up with the pentagon  
18 solution.

19 It was such a good solution that Broetje thought  
20 it was a good a solution and they adopted the pentagon  
21 shape. You didn't see them come up with an octagon or  
22 triangle shape. No, they used the pentagon shape because  
23 they knew that that was the optimal shape because AHG had  
24 already put in the blood, sweat and tears to come up with  
25 that.

1                   Let's go to the next.

2                   Here is the tube shape that AHG developed.

3                   The next slide, please.

4                   And here is the patents issued to Mr. Bornes and  
5 his father in law, Jean-Marc.

6                   The next slide.

7                   You see lots and lots of these, but just to  
8 remind you, the cassette is loaded by the loading station,  
9 and then the cassette is put into the rack, and then the  
10 rack is delivered to the machine. They all operate together  
11 as a functional unit.

12                  This is what you heard about the Judge talking  
13 about convoyed sales and damages. You don't sell these  
14 things. You don't go out and say, hey, you want a loading  
15 station? No. Because the loading machine is made for the  
16 AHG cassette. The AHG cassette is made for this rack.  
17 These are all sold together as a unit. That is why in the  
18 damages area, we are asking for sales of losses of the whole  
19 system rather than just the whole cassette, because you  
20 can't separate the two.

21                  Now, if we can go to the next slide, please.

22                  Now, this is PTX-385T.

23                  Now, what this is, for some reason, again, it's  
24 kind of hard for us to believe, but they're taking the  
25 position that they gave us lots of information to help



1 develop this. Well, you know we already developed it when  
2 they contracted with us. In fact, that is why they entered  
3 the contract is because they wanted our system.

4 And then right from the get-go, Mr. Holtmeier  
5 who is like the CEO of Broetje says: With the signing of  
6 the contract, please let us have more detailed technical  
7 information.

8 So right from the get-go, they wanted to  
9 understand how our system worked and operated.

10 And with the contract, we were able to do that,  
11 because we were protected under the contract.

12 Excuse me. (Taking a sip of water.)

13 If we go to the next slide, please.

14 So the first thing we tell them, we just remind  
15 them it's subject to patent protection. Again, this is  
16 1994. We're telling them we're getting a patent. A common  
17 type of thing to do.

18 Next slide, please.

19 And the interesting thing, there is a clause in  
20 this contract. This says: Broetje agrees to promote the  
21 sales of the AHG feed systems in the most loyal, serious,  
22 and efficient way possible.

23 They're agreeing to be loyal to them. Broetje  
24 is going to be loyal to AHG.

25 Now, we already know, we kind of -- I'm going to

1 give you a head up on that. There is no loyalty here.

2 Now, I'm not saying, we're not talking about  
3 breach of contract. Again, you heard the Judge's instruction.  
4 And you are not here to determine whether there is a breach of  
5 contract or not, but you can understand it is a lot of their  
6 intent. This is an obligation they signed up to: To be  
7 loyal. Okay?

8 Now, there is a technicality they may bring to  
9 your point that a French court said, well, it wasn't a  
10 contract with F2C2. And they're right, the French court  
11 said, no, this is a contract with AHG, not F2C2. So they're  
12 technically no longer applied to F2C2, but it depends on  
13 what kind of businesspeople they are. Are they really --

14 You heard Mr. Neugebauer said I always thought  
15 they were one company. So why didn't you operate under the  
16 obligations that Mr. Holtmeier signed to? This is something  
17 for you to consider when you are thinking about intent here.

18 If you go to the next slide, please.

19 This, right here, this is again in the contract:  
20 Broetje agrees not to sell directly or indirectly feed  
21 systems with identical or similar tubes.

22 Again, it's an obligation they're signing up to.  
23 Of course, we know now that they do do that.

24 In addition, the dealer -- which is Broetje --  
25 agrees not to use, directly or indirectly, such documents

1 and information after the expiration of this contract.

2 In other words, they're not going to use our  
3 information after the contract is terminated.

4 So, in other words, they won't do JTX-14, the  
5 copy document. They're not going to do that. They're not  
6 going to use our information. They are not going to take  
7 pictures or use our device. They agreed not to do it,  
8 although they do do it. We know they do it.

9 Next slide, please.

10 Now, about the technical information. Where did  
11 the technical information come? We know Mr. Bornes was the  
12 inventor, co-founder of F2C2, and developed this system.  
13 And his testimony.

14 "Question: Okay. What kind of information did  
15 Broetje request all the time?

16 "Answer: They requested all they need to make  
17 sure the system is working and including drawings,  
18 schematics, everything they need to know exactly what was  
19 our testimony.

20 "Question: Why did you give it to Broetje if it  
21 was proprietary to AHG?

22 "Answer: It was in our agreement in 1994. I  
23 was protected from that."

24 He trusted Broetje. He gave all the technical  
25 information they asked for. They may have made some

1 suggestions. We're not denying that. In fact, a lot of the  
2 suggestions, Mr. Bornes thought about and sometimes have a  
3 solution, sometimes not. We don't deny there were some  
4 tweaks on the system, maybe, but they didn't create the  
5 system. The system was already there. The whole invention  
6 was already there. The pentagon was already there.

7 If we can go to the next slide, please.

8 Here is another one, PTX-118, where Broetje  
9 again is asking: Please give us more detailed information  
10 (drawings, photos).

11 And this is in 1994 we gave them that information.

12 If we go to the next.

13 Again, what I told you about, I'm going to keep  
14 showing you testimony. Your job is to weigh the evidence  
15 not, what I say or don't say. My attorney argument is not  
16 supposed to come back with evidence on. You look at the  
17 documents, look at the testimony. Here is some more  
18 testimony.

19 Trial testimony of Mr. Maylander:

20 "Answer: I got information from Mr. Bornes,  
21 that he informed me that they are also going to work  
22 together with our competitor, Gemcor."

23 Back up for a second. After we decided to give  
24 them technical information -- this is when we're going back  
25 to, we're going back in more detail. We're going back in

1 the time frame, we're going back in 2002. We're going to  
2 revisit of the time frame I talked about earlier, and this  
3 is where I'm talking about Mr. Bornes being up front with  
4 Broetje; and you can see here that: Mr. Bornes informed  
5 me that they are also going to work together with our  
6 competitor, Gemcor.

7 Again, Mr. Bornes, you know the type of person  
8 is, informed them I'm going to do some work with Gemcor.  
9 You know, give me some feedback. What do you think? He was  
10 upfront. Very candid.

11 The same thing with Mr. Neugebauer:

12 "Answer: So that Phillippe has explained to  
13 Maylander and to myself that they want to in principle sell  
14 the technology to our heaviest competitor."

15 It's interesting because Mr. Bornes hadn't even  
16 sold anything to Gemcor. He is basically going to Broetje  
17 and says, look, guys. This is what I'm going to do. You  
18 have been my partner for many years. We can sell outside of  
19 Germany, the contract is, but I'm going to tell you upfront  
20 and get your feedback. And, boy, did he get feedback. You  
21 saw what happened. We'll go into that in a minute.

22 Excuse me. (Taking a sip of water.)

23 Next slide, please.

24 So I'm not going to go back through this. This  
25 is the JTX-66 where Mr. Maylander again confirms that he

1 told them that.

2 Let's go to the next one, please.

3 And the next slide, please.

4 And here is the e-mail from Mr. Neugebauer which  
5 I talked about. Again, this is the e-mail that came out  
6 after they had already made a decision to start developing  
7 and already created the copy document, JTX-14. So the  
8 decision has already been made even though he indicates that  
9 it hasn't been made. He says there is a possibility that we  
10 will quit the relationship.

11 That is not true. And he admitted on the stand  
12 it wasn't true. He said he was just trying to pressure Mr.  
13 Bornes. He was trying to pressure Mr. Bornes to quit working  
14 with the competitor Gemcor while they were developing their  
15 own behind their back.

16 Turn to the next slide, please.

17 Now, here is the trial testimony of Mr. Neugebauer.  
18 And this is when I was questioning him about that e-mail and  
19 ask him whether he is being truthful in that e-mail to Mr.  
20 Bornes.

21 "Question: And do you typically do that in  
22 e-mails and letters, where you say something that is  
23 actually not true?

24 "Answer: Not really.

25 "Question: But you did though this time,

1       though.   Yes?

2               "Answer:   To put him under pressure, yes."

3               He admitted he lied to Mr. Bornes.   Do not do  
4       any work to Gemcor.   Don't sell your system to Gemcor.

5               But did he tell him, oh, by the way, we're  
6       making our own system.   We're not going to deal with you in  
7       a couple more months?   No, he just didn't want to deal with  
8       Gemcor.   At the same time, behind his back, Mr. Bornes'  
9       back, they were developing their system.

10              "Question:   To put someone under pressure, you  
11       might put an untruth there?"

12              He agreed:

13              "Answer:   To put him under pressure."

14              Mr. Neugebauer lied to achieve something.   Now,  
15       he was the program manager for the whole system and the  
16       whole thing there.

17              What about the trial testimony of Mr. Maylander?

18       So we asked him:

19              "Question:   So AHG was perfectly within their  
20       bounds to sell to Gemcor, who was located in the United  
21       States.   Correct?

22              "Answer:   That's what I understand, yes."

23              So Mr. Bornes, he was within his bounds.   Not  
24       only did he tell him, but he was perfectly within his  
25       bounds.   AHG never had any obligation from Mr. Bornes not

1 to sell to competitors in another country. He won't sell to  
2 competitors in Germany. So the next slide, please.

3 Okay. So as I said, we beat this document to  
4 death. I'm not going to go back through it again. This is  
5 the copy document.

6 The next slide, please.

7 Now, let's fast forward into 2003. Well, it  
8 was 2003 when they start developing their own cassette, June  
9 2003. So they obviously know if they're copying something  
10 they had better be careful and see that they don't get  
11 themselves in trouble or at least keep it down or concealed  
12 so that AHG can't find out anything.

13 So they go to Mr. Budach and they ask about  
14 infringement. Well, ultimately, Mr. Budach says it must be  
15 specified in greater detail in order to be able to rule out  
16 an infringement.

17 Mr. Budach did not come up with any opinion in  
18 2003 whether there is infringement or not. In fact, there  
19 maybe a concern there was infringement, studying our system.  
20 Again, this is after they already started developing their  
21 own system.

22 So there is no opinion now. This is still 2003.  
23 Remember, they learned about our patent in 1994. So we go  
24 from 1994 to 2003, still no opinion.

25 So let's go to the next slide, please.



1 And here is the trial testimony from Dr. Budach.

2 "Question: Are you saying that you didn't  
3 consult with United States lawyers? You didn't have the  
4 ability to do that in 2003? That wasn't something you did?

5 "Answer: (Through translator) I am talking  
6 with regards to this case. We do not use the advice,  
7 separate advice of U.S. patent attorney."

8 CLAAS and Dr. Budach made a decision not to go  
9 outside to U.S. attorneys and get independent advice.  
10 Dr. Budach is an employee of CLAAS. Broetje was owned by  
11 CLAAS. It was within the company. He was given the advice.  
12 Whether we call that impartial advice or not, I don't know.  
13 It's more maybe let's try to figure out advice and a way to  
14 do things where we don't get caught. That is something for  
15 you to decide.

16 Let's go to the next slide, please.

17 The other thing, you probably remember that  
18 Dr. Budach had that demonstrative they had up there with  
19 the Shinjo reference and three big photos and he got  
20 cross-examined on them. You won't see that and it won't be  
21 part of the evidence, but he kept talking about the Shinjo  
22 reference.

23 And you heard Mr. Lawrence, their expert, talk  
24 about it. What you will see, he admits that in his 2003  
25 report, we said in there, there is no cite to the Shinjo

1 reference. And we will show you in this 2005 e-mail  
2 opinion, which he calls an opinion, there is no citation  
3 reference to Shinjo. That whole slide they showed you  
4 about his thing about Shinjo was a conceived, you know,  
5 the-night-before-testimony type of situation.

6 So we have already talked about they copied it.  
7 They used JTX-14, the development document, that they  
8 actually copied it and the situation we have here.

9 If we go to the next slide, please.

10 And the interesting thing, this doesn't show up  
11 unfortunately very well on this slide, but in 2005, and you  
12 heard the Judge's instruction, just because there is a label  
13 on there doesn't mean there is not a trade dress  
14 infringement. That doesn't get you out.

15 All of you, I'm sure in your own common  
16 experiences, understand. I was thinking of an iPhone.  
17 iPhone is made by a different company. It's made in China  
18 by another company. It has Apple things on it but that  
19 doesn't necessarily mean that is who manufactures it.

20 Just because you have AHG or Broetje or you have  
21 Broetje on there, a customer isn't going to automatically  
22 think because it says Broetje on there that this is not  
23 manufactured by AHG, because AHG may have given them  
24 permission to put their logo on there.

25 The customer may look and say that is an AHG

1 cassette. Broetje put their name on there because they have  
2 the whole system and they got some deal together. Who  
3 knows. That is pure speculation on that part.

4 What I'm trying to tell you, just because  
5 there is a label on there, you can see that in your jury  
6 instructions, doesn't necessarily mean that is it. That is  
7 the end of the case.

8 (Holding up chrome cassette with big label by  
9 the handle.) Look how small that label is. Just a small  
10 black, no red.

11 And this is what they, this is what they could  
12 have done (holding up red cassette. There could have been  
13 no dispute on this one. You would have seen it right off  
14 the bat.

15 The next slide, please.

16 Now, I'm not going to be too long. There is  
17 this theory that they make that somehow they came up with  
18 the trade dress in the United States first.

19 It's almost not worth we think addressing but we  
20 will address it briefly here. Maybe in rebuttal, I'll spend  
21 more time on it. We've been selling cassettes these  
22 cassettes through Broetje for a number of years, starting in  
23 2002, 2001. Many of them were in the United States. In  
24 fact, you will going to see something about Vought today  
25 from the opponents here.

1 But you can see right here and the same time  
2 frame that they sell in 2004, here is the shipping delivery  
3 order to Vought, the same shipping order where it says:  
4 Country of manufacture: France.

5 Now, what do you do with these delivery order  
6 things? You heard the testimony of Mr. Benczkowski. I  
7 think he called that a typo. I don't know how reliable  
8 these are. And I don't know if Mr. Benczkowski knows how  
9 reliable they are.

10 The country of manufacture or country of origin.  
11 It could be France or Germany. It's just for customs sake.  
12 So we can't identify necessarily whose cassettes they are.

13 Now they're going to show you something that says:  
14 Country of manufacture: Germany. Like Mr. Benczkowski  
15 said, it could have been a typo. They could have put  
16 Germany because it was being shipped from Germany. These  
17 are always being shipped from Germany. It doesn't  
18 necessarily mean it's a Broetje cassette, like they were  
19 going to try to tell you that.

20 Go to the next slide, please.

21 Now, finally in 2005, middle of 2005, Mr. Bornes  
22 is in a plant. And you heard his testimony. And he sees  
23 for the first time a cassette that he knows is not his, and  
24 he realizes its Broetje.

25 Again, remember back in 2002, when Mr. Maylander

1 sent an e-mail -- in 2003 to Mr. Neugebauer. Several years.  
2 He had no way to know. It took him a couple years and it  
3 was just by pure luck that he discovered it. He happened to  
4 be in a plant where he was near a machine that actually had  
5 some Broetje cassettes. And he was shocked. You saw him.  
6 You heard his testimony.

7 So what would someone naturally do on that? I  
8 didn't know they were designing their own cassette. No one  
9 told me that.

10 So they talked to their lawyers. Their lawyers  
11 sent a letter telling them to stop infringing our intellectual  
12 property, our patents.

13 The next slide, please.

14 So that then comes Dr. Budach. He now is  
15 engaged. 2005. There have been threats and now they  
16 realize they had better do something because they saw there  
17 was no opinion there from Dr. Budach yet. It was just we  
18 have a problem but we're not sure what to do with it.

19 So he writes the opinion, but it is very  
20 interesting, his opinion. Again, this is DTX-1605.

21 He ends his opinion just like this. His  
22 opinion, if you read it, you will see it is very weak.  
23 There is no analysis. It is very short. But he ends it  
24 with this: With deliberate use of third party property  
25 rights, CLAAS-internal management approval would have to

1 be obtained. We could possibly discuss briefly by phone  
2 beforehand whether that is necessary here.

3 Does that sound like a definitive opinion there  
4 is no infringement? No. It sounds like there is a concern  
5 here. You know, maybe we're infringing so let's get on the  
6 phone and get an okay about our internal management. Who  
7 knows whether that conversation ever took place. We don't  
8 know.

9 AHG has a belief, and I'm going to tell you I  
10 think it did take place. That is purely my argument.

11 Let's go to the next slide.

12 And this is the testimony from Dr. Budach.

13 "Question: You wrote this e-mail to advise  
14 Broetje of what your position was within the context of the  
15 German proceeding. Correct?

16 "Answer: Yes."

17 So he is writing his e-mail. He finally does  
18 an opinion, and he is really being forced to. He is being  
19 forced to because of the threat now of the German  
20 litigation.

21 So it took that to finally come up and try to  
22 figure out what they're trying to do. So he had to figure  
23 out do we really infringe? Because I didn't really didn't  
24 do something back in 2003 after I find out we're in trouble  
25 there. Because we know we copied them, we have a pentagon

1 shape, so maybe we can try to tweak some technicality out  
2 here or something like that.

3 Let's go to the next slide, please.

4 Here is some more testimony from him.

5 "Question: And at the time you wrote this  
6 e-mail in September of 2005, you still had not obtained an  
7 opinion from United States lawyers about the United States  
8 versions of these patents. Correct?

9 "Answer: Yes."

10 Remember he said we have to make that phone call  
11 to internal management and see if we can deliberately use?  
12 Well, clearly, they're not going to go to outside counsel in  
13 the United States if they're going to do it behind their  
14 backs. That wouldn't make any sense.

15 The smart thing would be to go to U.S. lawyers  
16 who know U.S. law, who know how to do U.S. patent law, and  
17 get a proper opinion. You heard Dr. Budach is not qualified  
18 in the United States to practice patent law. He is not a  
19 patent lawyer in the United States. He is not qualified.  
20 He is not licensed to do it.

21 Next slide, please.

22 And, again, that 2005 e-mail, just like the 2003  
23 e-mail, has no discussion of this Shinjo. That little  
24 slide, they showed you three things on there in Shinjo,  
25 again that was created the night before his testimony.

1 There is no mention of Shinjo. And you can look at that,  
2 his e-mail. And it's DTX-1605. If you look at DTX-1605,  
3 there no discussion of Shinjo.

4 Now, let's go to Broetje USA. Next slide,  
5 please.

6 We were talking about Broetje Germany there,  
7 Dr. Budach, with CLAAS in Broetje, Germany. So a separate  
8 company. But this is Broetje USA.

9 So we asked Mr. Benczkowski, the President of  
10 Broetje USA whether he ever received an opinion of whether  
11 or not there is infringement of the '216 and '339 patent or  
12 the AHG patents. How did he answer?

13 "Question: Have you ever seen an opinion,  
14 whether in-house" -- in other words, Dr. Budach or someone  
15 else like him -- "or outside counsel, relating to the  
16 infringement or invalidity of AHG's patents?

17 "Answer: No."

18 So from the standpoint of Broetje USA, they  
19 never received an opinion whether or not there is  
20 infringement or not. And Broetje USA was selling in the  
21 United States obviously. They are located in the United  
22 States. They're selling infringing goods. They're selling  
23 cassettes. They facilitate the sales. Mr. Benczkowski's  
24 sales team goes out there and sells on behalf of Broetje  
25 Germany, but he never received an opinion.



1           Two separate corporations. In your verdict  
2 form, you will see that is separated on willfulness: Does  
3 Broetje USA willfully infringe? Does Broetje Germany  
4 willfully infringe?

5           There is no opinion here.

6           So go to the next slide, please.

7           So these kind of summarize the willful  
8 infringement and the wilfulness standpoint. They first  
9 learned about -- they first learned about the patent.

10           (Post-It note passed to Mr. Lindvall.)

11           MR. LINDVALL: I'm being put under pressure now.

12           They learned about the patent in 1994 with the  
13 contract we had. Then you recall there was a document, and  
14 I haven't showed it to you but you have seen it a number of  
15 times, in 2000, Mr. Bornes actually sent the European patent  
16 to Broetje at their request.

17           Again, in June 2003 -- well, June 2003, Broetje  
18 begins to develop copy cassettes.

19           Dr. Budach independently finds the AHG patents.  
20 Again, doesn't give a definitive opinion. He says I need  
21 more information.

22           Then in 2005, Dr. Budach's opinion suggests  
23 deliberate use of AHG's patents. He said all I had to do  
24 was make that phone call.

25           Now, let's turn to the next slide.

1           This is the French decision. Again, I've  
2           already told you about that, and the Judge has instructed  
3           you about French law, but, again, it's relevant from the  
4           particular point of view here because what they did with  
5           this cassette. I'm sure they're going to tell you about the  
6           German decisions, and all the other decisions. This is the  
7           only decision that has been admitted into evidence. So all  
8           these that talk about German decisions and what have you,  
9           you are not going to be able to look at. They can  
10          characterize them any way they want to, but they are not in  
11          evidence and you are not going to be able to see them anyway.

12                 The fact is there is a relevant part about this.  
13          It's not that the French court found infringement, because  
14          their law is different, as you heard this Court say. But  
15          they did find, first of all, that there was infringement of  
16          the European patent by Broetje. This goes to willfulness.  
17          It's state of mind. So they were found infringing the same  
18          patent Dr. Budach supposedly gave an opinion on.

19                 And then the French court, three Judges, found  
20          that "Broetje was copying in a servile manner" -- almost a  
21          slavish manner, just taking it and making a picture perfect  
22          copy of it -- "the appearance of the cassette produced and  
23          commercialized by companies AHG and F2C2 System, thus  
24          creating a risk of confusion with the activities of these  
25          two companies."

1                   That's the finding of the French court. Again,  
2                   applying French law.

3                   What happens as a result of that?

4                   Will you turn the slide, please.

5                   So we asked Dr. Peters, the Chief Operating  
6                   Officer of Broetje Germany.

7                   "Question: Okay. And when did Broetje begin  
8                   redesigning this cassette?"

9                   In other words, make it look differently.

10                  "Answer: After we got a court judgment in  
11                  France."

12                  They went all these years after they developed  
13                  theirs, basically thumbing their nose at us until they were  
14                  forced to. Now they said, you know, what we'll change our  
15                  appearance. We'll make sure we're not confusing customers  
16                  any more.

17                  "Question: And what about the court judgment in  
18                  France caused you to redesign the cassette?

19                  "Answer: We were informed by our legal staff  
20                  that we would have to redesign, newly design the cassette."

21                  And the next slide, please.

22                  He goes on and says, this is trial testimony you  
23                  heard.

24                  "Question: Okay. Did they tell you why you had  
25                  to redesign the cassette?

1                   "Answer: So that the cassette would be clearly  
2 recognizable as our cassette."

3                   So three Judges in France says this is going to  
4 cause confusion. You have got to change it. Their lawyers,  
5 Broetje's lawyers and CLAAS told them redesign it so we  
6 could clearly recognize it so there can't be confusion.

7                   "Question: Now, was there any change" -- this  
8 is important -- "was there any change with respect to the  
9 function of the cassette?"

10                  This cassette here when they redesigned it.

11                  "Answer: We did not make any changes in the  
12 function of the cassette."

13                  And you may have heard the Court talk about  
14 functional versus nonfunctional and you can't protect with  
15 trade dress of the functional aspect. Some things can have  
16 both a functional aspect and a non-functional aspect. It  
17 was confusing. It took me awhile to figure it out myself.

18                  The Coke bottle is a good example. The Coke  
19 bottle has a function. It holds Coke. Also, it is one of  
20 the most protectable trade dresses in the world. A design  
21 it has a certain look and feel. When you see a Coke bottle  
22 you know it's a Coke bottle. If you go out there and use  
23 the Coke bottle and use some other liquid out there, I  
24 guarantee you will be getting one of those letters from  
25 Coca-Cola because they're protecting their trade dress.

1           Yet it is functional. So just because something  
2           has a functional aspect, you can also have a nonfunctional  
3           as spent.

4           Let me show you some aspect. The handle. It  
5           was exactly like ours. Same shape, same placement, same  
6           color. Now it's a different color, different shape than it  
7           was before.

8           Color of the chrome. Chrome can be lots of  
9           different colors. So they turned it into their red color  
10          because the red and black, they're competitive colors that  
11          they have.

12          What about the full plastic front that we talked  
13          about? That is all they need is a little window there. And  
14          this shows that's all they need is a little window. They  
15          didn't need the full plastic look. That was all they had to  
16          do was to do that. That was a look thing. This was looks.  
17          The color was looks.

18          They're going to make a big deal about the  
19          sides, that our side for awhile was clear. It doesn't --  
20          this one. I mean these are the same thing.

21          There is a slight difference in the size. But  
22          they still, they still look like each other. Same handles.

23          Just because there are some slight differences  
24          doesn't mean they're not protectable anymore. That is what  
25          they should have done a few years go, and except for the

1 patent aspect of it we wouldn't be here today. We wouldn't  
2 be talking about trade dress. That is all they had to do.  
3 Very simple. Not a difficult chore.

4 Next slide, please.

5 Now let's go very briefly with respect to  
6 infringement.

7 I'm not going to go through that. Dr. Kytomaa  
8 brought you through very carefully why they infringed. Dr.  
9 Kytomaa was a professor at MIT in fluid mechanics. He has a  
10 Ph.D. This is his job. He walked you through, and what he  
11 showed you was a video.

12 And this is a Broetje machine that he actually  
13 went to Gemcor and he actually filmed and studied. You can  
14 see the rivets going through there. They're not zigzag or  
15 anything else like that. They're going through there just  
16 like the patent talks about in the claims. He gave  
17 compelling testimony about how that happens.

18 What did their expert do? The lawyers sent him  
19 a cassette to his house. The lawyers put the cassette in  
20 there -- the rivets in there, and then he hooked it to a  
21 compressed hose in his house and he took some still photos.

22 That is not how it was used. It was used like  
23 Dr. Kytomaa did in the real situation to see how the rivets  
24 are going through there.

25 Who are you going to believe, Mr. Lawrence's

1 testimony where he used a cassette in a home that was  
2 provided by the lawyers, or Dr. Kytomaa who went to Gemcor  
3 and actually saw a Broetje cassette in action and with a  
4 rack and the machine?

5 Okay. Let me go to the next one quickly.

6 You saw this in Broetje's opening slides. They  
7 talk with this being our design, or Broetje's first design  
8 and it was rejected, and they changed it to this design.  
9 And you heard Dr. Kytomaa's reaction to this slide.

10 Let's go to the next slide, please.

11 Let's go to the next slide, quickly.

12 What Dr. Kytomaa clearly showed -- and it makes  
13 perfect sense -- what you have, you still have grooves. The  
14 grooves are a slightly different shape here but there is no  
15 difference in there.

16 And as you see, Dr. Kytomaa considered this  
17 still infringes. It's still a pentagon and it still has  
18 grooves. Just because this is maybe a circle here, and you  
19 look at the claims, it doesn't say that the groove has to be  
20 a circle, it doesn't give any particular shape, it just has  
21 to allow the air through when you put the circle in there,  
22 and that is what we have done. That is exactly what they  
23 are doing. They are still infringing. They didn't get  
24 around anything. The opinion is in good faith because of  
25 this.

1 Now, let's go quickly to the next slide.

2 Invalidity. This is an easy. This is an easy.

3 They say our patents are invalid over Shinjo. Correct?

4 Now, to do invalidity, it's like the flip side. They have  
5 to show that all of our elements in the claim are in that  
6 reference in Shinjo. You have to find them somewhere. If  
7 that is true, that means Shinjo already came up with the  
8 invention.

9 Well, you heard Mr. Lawrence. He admitted that  
10 Shinjo does not have grooves. Grooves is an important part  
11 of every one of the claims. If it doesn't have grooves, it  
12 doesn't invalidate the patent. He admitted it on the stand.

13 And, again, same thing. He also admitted that  
14 it doesn't have, in the '339 patent, the axis of revolution.  
15 Again, that is part of the things he had to show regarding  
16 invalidity. He basically admitted there is no invalidity  
17 here.

18 Next slide, please.

19 And the same thing with the Offutt patent.  
20 We're here looking at Shinjo and Offutt. Those two patents.

21 He admits here that the Offutt patent does not  
22 have grooves. Again, I'm showing you actual trial  
23 testimony. This isn't a magic slide. This is all through  
24 trial testimony that has been testified under oath and  
25 argued.



1                   Next slide, please.

2                   And this is my last slide. You will see me on  
3                   rebuttal, and I'm sure you're hoping not very long, but just  
4                   for your information, you saw this with our damages expert.

5                   These are the damages that AHG is seeking. And  
6                   you can see for patent infringement, it's lost profits, and  
7                   then for other claims it can be either the unjust enrichment  
8                   or the lost profits, and the Judge's instructions will teach  
9                   you to do that.

10                  Of course, the last thing we're going to ask you  
11                  to award is punitive damages. You have seen their conduct  
12                  here. They concealed material facts. They deceived, they  
13                  deceived AHG. They deceived Mr. Bornes. Mr. Neugebauer  
14                  purposely tried to lead him astray while they were  
15                  developing their own product.

16                  That is just the kind of conduct that punitive  
17                  damages is out there to cover. It's to punish a company and  
18                  stop that kind of conduct, that willful-type conduct. That  
19                  is not proper conduct, and that is when you award punitive  
20                  damages.

21                  We'll talk about it a little bit more, but you  
22                  can see the Judge's guidelines on that, but that is why we  
23                  have punitive damages, why we are asking for wilful.  
24                  Because this was intentional copying. You can look at these  
25                  cassettes. Look at the third-party cassettes and the other

1       one. This is a complete knockoff.

2               Thank you.

3               THE COURT: Thank you, Mr. Lindvall.

4               Mr. Kelleher.

5               MR. KELLEHER: Thank you, Your Honor, very much.

6               Ladies and gentlemen of the jury, I would like  
7       to reiterate Mr. Lindvall's appreciation for giving us your  
8       time. I know it is very valuable, and thus I will try to  
9       keep myself short.

10              As has been said, and the Judge has instructed  
11     you, this is not a contract case although when I hear my  
12     opponent's argument I almost forget that sometimes.

13              As we pointed out, there a decision of the Court  
14     of Appeals in France that specifically addressed this issue  
15     about a contract. If there was any kind of a contract  
16     between AHG and my client Broetje, the French Court of  
17     Appeals found that that relationship ended very peacefully  
18     in 2001 when they stopped doing any business with us without  
19     any prejudice to them.

20              If there any kind of contract that arose later  
21     on when F2C2, a new company, came on the scene, the French  
22     Court of Appeals decided that Broetje was within its rights  
23     to end the relationship because F2C2 delivered defective  
24     product to Airbus and after more than a year still could not  
25     fix them. So this is not a breach of contract case because

1 in France, it has already been decided we didn't breach any  
2 contractual obligations. Specifically, it was decided that  
3 there has been no breach of any obligation of confidentiality  
4 or loyalty. So that has been laid to rest in France.

5 So what is the case really about, though? It's  
6 a trade dress case which is about the look of the product.  
7 And it's a patent case. It's about the way the product  
8 works. That is what I told you in my opening. That is what  
9 the evidence has showed.

10 So why don't we go through what is the real  
11 story in this case. So you heard from people from my  
12 client: Mr. Benczkowski, who is at counsel table, Mr.  
13 Maylander, Mr. Neugebauer, Dr. Peters, Dr. Budach from  
14 CLAAS, the former parent company.

15 So I told you at the very beginning of this  
16 case in the opening that the parties worked together for a  
17 number of years to develop a better working product that was  
18 originally developed to us when we started working, with AHG  
19 and then F2C2 in the mid-90s.

20 And you heard from Mr. Bornes agreeing and from  
21 Mr. Maylander and from Mr. Neugebauer there were a number of  
22 suggestions and improvements that were originally my clients  
23 idea:

24 The magnetic code leader in the back of the  
25 cassette that allows the rack to know what's inside the

1       cassette.

2               My client rewired the rack when it first arrived  
3       because they said it was like a child's racetrack toy.

4               We provided the circuit diagram.

5               We provided software.

6               We provided the idea of a throttle to regulate  
7       the air pressure so rivets wouldn't be jammed on the inside.

8               We provided the idea of a slide mechanism in the  
9       rack to replace that. In fact, that crazy rotator thing  
10      where the rivets would have to fall down to the bottom and  
11      Boeing Wichita had to have a full-time employee called  
12      "rotator man" coming out and fixing it every single day.

13              So everyone agrees that my client came up with a  
14      whole bunch of ideas that AHG and F2C2 built into their  
15      cassette and they're still there today.

16              But around the beginning of the year, the early  
17      2000s, troubles began to mount. They began to have a lot  
18      more problems with them. And Mr. Neugebauer informed you he  
19      began to put them into a normal document called a fault  
20      report.

21              So the very first one began I believe in 2000.  
22      Here, we have some more notable ones from 2001 where they  
23      have all kinds of problems with the cassettes. They have to  
24      be sent back or reworked because rivets are sticking inside  
25      the tubes in the cassette, they're sticking in the escape

1 mechanism, they can't get out. They have all kinds of  
2 problems.

3 This is one from the United States -- or United  
4 States customer I should say. They delivered all of these  
5 cassettes from France to Germany when my client is putting  
6 together this gigantic machine to be delivered to Boeing  
7 Wichita and these cassettes don't taken fit into their own  
8 rack. They can't even manufacture their cassettes to the  
9 proper tolerance so they can slide into these openings.

10 So these problems with quality and, of course,  
11 the ultimate betrayal of beginning to work with Gemcor just  
12 became intolerable for my client. They spoke about the  
13 quality problems. They couldn't deliver things on time to  
14 us. You saw the e-mail from Mr. Maylander to them saying  
15 that their delivery delays are becoming a bottleneck for our  
16 production, and that we learned of our bottleneck from the  
17 folks at Boeing Wichita who are complaining about the  
18 problem.

19 They complained in particular about F2C2 sharing  
20 our improvements our suggestions for their system with their  
21 competitor Gemcor because we had worked together for a very  
22 long time. You saw the e-mail, JTX-66, that my opponent  
23 showed from Mr. Maylander where he said we worked together  
24 to put together the ARA, automatic rivet system.

25 Did we see any writing back from Mr. Bornes

1 saying, no, we didn't, these are all my ideas? He accepted  
2 that as true. He understood why my client was so angry that  
3 our ideas were now to be sold to our chief competitor. You  
4 don't get our know-how for free.

5 Now, you will notice a couple of things.

6 We heard during this case a couple of times that  
7 it was maybe when CLAAS assumed full ownership as the parent  
8 company in 2003 that things changed. Maybe it was a bit  
9 earlier in 2002 when Gemcor came on the scene. But here is  
10 a letter from October 2001 from Mr. Neugebauer saying by  
11 adding all these problems -- and he is talking about  
12 technical problems, you can read it in the letter, it's  
13 Exhibit 1061 -- we are investigating in other solutions for  
14 rivet feeding.

15 So we told them all the way back in 2001, we  
16 might have to stop working with them and pursue other  
17 relationships because their product had a lot of problems  
18 and our name was on the line.

19 Just a few months later, in January of 20002,  
20 again, before they say things changed, we say that  
21 Mr. Neugebauer again at this point, we feel that we are  
22 being penalized for placing our faith in F2C2 because we're  
23 having problems with our customers because of their delays  
24 and their bad workmanship.

25 So we reach a point in time where we realize we

1 have to make our own system. We cannot continue to rely  
2 upon these delivery delays and the bad workmanship, getting  
3 complaints back from our customers, so we decide we have to  
4 go through our own R&D process. And now you've heard that  
5 there's this JTX-14 document that supposedly is the copying  
6 document. This was the document that shows here's the  
7 example of what we used and have to improve on it. What's  
8 the name of the document? It's to build an innovative rivet  
9 feed system. What does innovative mean? It means new. Not  
10 a copy. When you copy, it ends up looking like the thing  
11 you copied.

12 Here's the product that they used to sell to us.  
13 It's plastic on four of the sides on the top. It has got  
14 these number counter things on the front. It has got this  
15 chain in the back. It has got colored tape on it.

16 This came out. Here's what my client came up  
17 with. We decided to make it metal all the way around. We  
18 put a window in the front. We don't have these bad counters  
19 on it. We have this metal bar here (indicating) for a  
20 little bit of extra stability. Instead of this chain,  
21 which could obviously get stuck on things, we came up with  
22 this thing in the back that you could just slide it onto.  
23 And this thing back here (indicating), this separator where  
24 the rivets were always getting stuck on their product, we  
25 built a new one that worked on an entirely different

1 principle.

2           Instead of having these little pins like this,  
3 we had these walls that go like this. Works a lot better.  
4 We put it on the inside so it wouldn't be able to get  
5 damaged when it's pulled in and out of the rack. So if we  
6 had copied this plastic box, we would have ended up with a  
7 plastic box like theirs. We didn't. We got something quite  
8 different. And then what do we do? We put our label on it.  
9 We put our name on it.

10           Now, it's not disputed that my client knew about  
11 their patents. We remember Mr. Bornes sent a letter in 2000  
12 to my client saying, here's our patent. It's on the rifles  
13 in the tube. What's rifles? Think about a gun, the long  
14 tube has carvings, etchings into it so the bullet travels  
15 more carefully. When my client got Dr. Budach from CLAAS  
16 involved, he ultimately reached the exact same conclusion:  
17 Their patent covers rifles or grooves etched into the walls  
18 of the tube.

19           So my client contacted Dr. Budach because we  
20 wanted to be sure we didn't infringe anyone's patents,  
21 including theirs, which we knew about, and what happened?  
22 Development goes forward in 2003. Dr. Budach is doing his  
23 investigations. He's forming his opinions and then he gets  
24 told, oh, in early November of 2003, we just sent this  
25 request to a tube manufacturer, asking them if they would be



1       able to make a tube like that.

2               As it happens, this is what F2C2's tube used to  
3       look like. Circle that actually had five grooves in it.  
4       That thing is not a pentagon. I know we've heard that word.  
5       That's not a pentagon. That's a circle with five grooves in  
6       it.

7               Dr. Budach hears about this. He says, oh, my  
8       gosh, stop. That thing might infringe because that has  
9       grooves in it and that's what their patent is all about.  
10      You can't do that. Use this instead (indicating). Use this  
11      soft pentagon as we call it. And because, as he explained,  
12      this way the air will still get all the way down the tube to  
13      the rivets by using the space that's around it, because as  
14      you know, we use a much smaller rivet than this overall  
15      space. That dotted line is not the rivet head here. It's  
16      just the diameter of that soft pentagon.

17              And so what did my client do? Just a few weeks  
18      after they sent this initial order, they wrote back to the  
19      same tube manufacturer saying, stop, stop. We do not want  
20      this. We need you to manufacture this instead (indicating).  
21      Can you please do that for us? And that is the -- that is  
22      the tube my client decided to use and they still use it  
23      today. Of course, the patent has expired, so even if they  
24      had infringed, it wouldn't matter. But this is what we  
25      chose and my client purposefully did that because they

1 wanted to avoid infringing AHG's patents.

2 Now, these two documents, I used them with Dr.  
3 Budach when he was on the stand yesterday, and in the  
4 hour-long cross-examination there was not one question put  
5 to Dr. Budach about these documents, because I'm sure they  
6 would not like the answers.

7 So this is Dr. Budach. Now, we know that my  
8 client went back to Dr. Budach in 2005 with a question  
9 because we got an accusation from them that we were  
10 infringing their patents. So management writes to Dr.  
11 Budach again in 2005 saying, are you sure about this? They  
12 showed him what we were using at the time. It's the soft  
13 pentagon he told them to use. And he wrote back. And  
14 this is the same 2005 e-mail that Mr. Lindvall showed you  
15 that has a line at the end about deliberate use of someone  
16 else's infringement would require us to talk to CLAAS  
17 management. Of course, it would, because that's against  
18 company policy.

19 Here's what he wrote on the first page of that  
20 2005 e-mail: If Broetje, instead of the cylindrical  
21 cross-section, which is the circle with the grooves, uses a  
22 pentagonal cross-section, there is already no infringement.  
23 So he knew they were following his advice from 2003 using  
24 the soft pentagon. He told them again, I already told you  
25 you aren't infringing, and I reiterate that. You're already

1 not infringing.

2 Now, they have said, oh, no, but you didn't go  
3 and get advice from a United States lawyer. The Judge has  
4 already instructed you, there is no duty in our law to go  
5 and get advice of counsel, but they did. Dr. Budach is a  
6 German patent lawyer. To become a German patent lawyer,  
7 you're required to learn quite a bit of U.S. patent law.

8 As you heard, there's an oral examination for  
9 five hours and you can be asked any question about law from  
10 all over the world, including United States law. Who are  
11 CLAAS' biggest competitors? Companies like John Deere. All  
12 their patents are United States patents. On a daily basis,  
13 he deals with United States patents. He's quite competent  
14 to interpret United States patents.

15 So what next? My client introduces into the  
16 market in the United States our metal cassette, our new  
17 metal cassette. What do we do for the customers? We know  
18 there are only four customers: Boeing, Spirit, Vought and  
19 Gulf Stream. We gave, we introduced into evidence shipping  
20 documents for all four of them showing them that Broetje is  
21 the source, the manufacturer of these cassettes. We're not  
22 tricking our customers. We're telling them, here's how our  
23 new cassette. We're the manufacturer. We make them in  
24 Germany.

25 Here's another document that we showed you.

1 Boeing asked, could you give us a quotation for budgetary  
2 purposes for your new cassettes? We said the Broetje build,  
3 that is the ones we built, it would be this cost.

4 Here is from January 2003, before we began the  
5 formal R&D process, a meeting Mr. Neugebauer was at in  
6 Dallas with Vought, and we're talking about the 50 new  
7 designed cassettes. Even then we are telling them, we're  
8 going to have our own cassettes coming out and, by the way,  
9 they're going to be metal. You can see those are not the  
10 F2C2 cassettes.

11 When Mr. Benczkowski was on the stand, he showed  
12 you e-mails that our spare parts manager, Laura Ballard,  
13 sent back and forth to customers. They would write to  
14 us we need some spare parts for F2C2 products. She told  
15 them, we don't do business anymore with F2C2. Here's  
16 their contact information. If we were tricking our  
17 customers into believing that we were selling cassettes made  
18 by F2C2, we wouldn't be telling them we don't do business  
19 anymore.

20 So like I said, it's a European litigation.  
21 They have stressed that they won parts of the French  
22 Appellate Court judgment and I have shown you, we've won  
23 part of it as well. There have been other cases as well.  
24 We've won a little bit more. We are happy about that.  
25 Nothing is really final yet. Like we said, everything

1 is on appeal to the Supreme Courts in France and Germany,  
2 and we all agree that none of the patent and trade dress  
3 issues are controlled by what has happened in Europe.

4 So the trade dress case. What legally is  
5 required here?

6 There has to be a likelihood of confusion for  
7 them to prevail on their trade dress claim. There is no  
8 possibility whatsoever that our customers, the four of them,  
9 could be confused into thinking that our cassette is made by  
10 F2C2. You heard Mr. Hage testify that the entire industry  
11 has known since 2008 about this dispute and that they  
12 accused us of copying. So they can't dispute it.

13 We have incredibly sophisticated customers, only  
14 four of them. They're custom products. They're built to  
15 order. They are not bought off the shelf. They are not  
16 bought side by side. You can't accidentally pick up one  
17 instead of the other.

18 There's a lot of customer contact. They come  
19 and visit us in Germany and they see these things, they pick  
20 them up. They see the brand name. They slide them in and  
21 out to make sure that they work; the racks, that is, not the  
22 cassettes. They're bought in a very selective specification  
23 process where things are detailed in incredible detail and  
24 they know exactly who the manufacturers are of the  
25 components we are giving them.

1           It has been ten years now since we started  
2     selling this in 2004 in the United States. They have not  
3     given you one bit of evidence there has ever been a single  
4     instance of confusion after ten years. You'll see in the  
5     jury instructions that's incredibly strong evidence that  
6     there's no likelihood of confusion if after ten years, none  
7     has cropped up.

8           Prominent branding. They have their name in big  
9     letters in the middle of their cassette and we likewise have  
10    our name on the front of our cassette. You can see it when  
11    it slid into the rack. They say it's small, but that's  
12    about the best size it can be when it's slid into the rack.

13          Priority of use. The Judge has read to you jury  
14    instructions 7.5. I hope you pay quite a bit of attention  
15    to this one when you are back in the jury room.

16          It says, one of the things AHG must prove is  
17    that AHG owns the chrome color of its cassette, and so  
18    forth, and the other elements they are part of their trade  
19    dress. It goes on. And to prove they own this, they have  
20    to prove that AHG used the trade dress in the United States  
21    in a manner that allowed customers to identify the trade  
22    dress with AHG or its product before the Broetje Parties  
23    began to use the current product.

24          It's undisputed that we began delivering our  
25    metal cassette to Dallas customer Vought in 2004. Now,

1 ladies and gentlemen, be sure when you are back in the jury  
2 room to look at PTX-129. This is the document Historique  
3 Cassette, the document created by them showing the history  
4 of the cassettes. And it shows you these images.

5 This is the product in 2003 that they were  
6 selling us, the plastic cassette. This is what we were  
7 delivering into the United States and this is what the  
8 customers saw.

9 In 2004, we developed the metal cassette. In  
10 this document, it shows you, they're Generation 5. They  
11 came out with in 2005, a year after we began using the metal  
12 Vought in the United States, they decide, oh, now we're  
13 going to be metal. They told you they've gone back to  
14 metal. All they mean by that is they are trying to say that  
15 they've gone back to the single metal cassette that they  
16 sold to British Aerospace back in 1991 that wasn't in the  
17 United States and it was at a secret military facility in  
18 Britain. As you will see by looking at it, it was a blue  
19 box with a with a silver handle. It does not look like  
20 anything they say was their trade dress. Everything is else  
21 was plastic in 2005, when they switched to metal after they  
22 saw that we had switched to metal.

23 Functionality. The overall appearance of this  
24 cannot be functional and it is the function of these things.  
25 The reason they look the way they do is their function is to

1 slide into a rack and to feed it rivets. Everything about  
2 it is necessary for that function.

3 Why do we have a clear case? Everyone who  
4 testified about that said it's to see inside, so you can see  
5 if the tube is still full of rivets, to see if there's a  
6 jam, to see where it is.

7 The size, shape and placement and color of the  
8 handle. Remember, this thing is meant to be carried around  
9 like a briefcase. You need a handle to do that. You can't  
10 have a handle over here either, where it will be off kilter.  
11 It will be tough to carry. And you need to be able to slide  
12 this thing in and out of a rack. You've got to have a  
13 handle for that. It has to be on the front, too. It  
14 couldn't be on the top or you'd be sticking your hand into  
15 this dangerous machine.

16 The chrome color. It has been discussed a  
17 number of times. The aluminum is much more sturdy than the  
18 plastic. That's its function. This is an industrial piece  
19 of equipment. It gets thrown around a bit in the airplane  
20 facilities. And numerous witnesses have told you that one  
21 of the problems with the plastic box is that it will crack,  
22 especially around the handle.

23 The placement of the white connectors. Now, the  
24 white is because that's an ordinary industrial plastic.  
25 They exist where they are because that's where the



1 compartments are in the back of the rack that they need to  
2 fit into for the rivets to come out of.

3 And on the loading station, that's where the  
4 rivets will go, will go into. That's required by the way  
5 these things operate, so the overall look and feel. There's  
6 no distinctive arrangement of look here. All the components  
7 add up to one big functional unit.

8 There's no secondary meaning in the United  
9 States. There are only four customers. Where is the  
10 evidence these four customers associate this box, whether it  
11 be metal or plastic, with F2C2? We didn't hear from any  
12 employee of any of these customers. The only, the close of  
13 the we came was our expert witness, Michael Lawrence, who is  
14 a former Boeing employee and worked with us now as a  
15 consultant now. He knows full well he works on both Broetje  
16 cassettes and AHG cassettes. It's not surprising,  
17 certainly, that there would be any secondary meaning or  
18 association by customers with F2C2 about the metal box  
19 because, of course, the customers had only seen the plastic  
20 box for years and years and years until we introduced the  
21 idea of the metal box.

22 So for the trade dress case, AHG failed to prove  
23 all the elements that they had to prove. They didn't prove  
24 priority of use. They didn't prove non-functionality. They  
25 didn't prove secondary meaning in the United States as of

1 2004, when we started selling. And they didn't prove  
2 likelihood of confusion. So you should return a verdict in  
3 my client's favor on all of the trade dress and unfair  
4 competition claims.

5 Intentional interference with respect to future  
6 economic advantage. Think about what they are talking about  
7 here. They are talking about money they hoped to get from  
8 Boeing, Vought, Spirit and Gulf Stream. They were our  
9 customers. They were our supplier. We were their  
10 customers. The only relationship that they have with our  
11 customers is the pass through to us. And think about it.  
12 They started doing business with Gemcore, so now they have a  
13 new passthrough. They didn't lose access to these four  
14 customers. In fact, they still say because they sell to  
15 Gemcore and now ElectroImpact, they have access to our four  
16 customers. They make sales through Gemcore. They get  
17 revenue from that. Their economic advantage has not been  
18 hurt. They have the same access to the four customers as  
19 they did before.

20 Now, I would like to turn -- so on the  
21 intentional interference claim, you should also return a  
22 verdict for my client.

23 I want to turn to the patent issues now. Dr.  
24 Kytomaa did get on the stand and I was actually surprised  
25 because he went a little bit too fast and he missed some of

1 the elements of the claims and he did not provide you  
2 evidence that my client actually has some of these claim  
3 elements in our product.

4 He skipped right over peripheral guiding. He  
5 didn't tell you the Judge's claim construction and he didn't  
6 tell you why. He never explained exactly where the supposed  
7 grooves are passed in the way he says are in my product open  
8 into a hollow center. We look at the smooth pentagon. It's  
9 just one big hollow center. Where is the point at which  
10 anything opens into anything else? We didn't hear an  
11 explanation of that.

12 Claim 6 --

13 MR. LINDVALL: Your Honor, I'm sorry. I have to  
14 object. Could we have a quick sidebar.

15 THE COURT: All right.

16 MR. LINDVALL: I hate to object.

17 (Sidebar conference held out of the jury as  
18 follows.)

19 THE COURT: We'll stop the clock, so don't worry  
20 about that. We'll take the time we need to figure this out.  
21 What's the issue?

22 MR. LINDVALL: There has been a  
23 mischaracterization of your claim construction. There's  
24 not -- the passageways of grooves, there is not a  
25 requirement it has to be cut into a wall and he has been

1 characterizing that. It must be a situation where there  
2 was --

3 THE COURT: Hold on a second. We're  
4 interrupting counsel's closing argument for what? To tell  
5 me --

6 MR. LINDVALL: Because he's mischaracterizing --

7 THE COURT: Hold on. Let me ask the question.

8 MR. LINDVALL: Sure.

9 THE COURT: He can argue any reasonable  
10 inference consistent with any reasonable interpretation of  
11 the claim construction of the evidence that has been  
12 presented. You think that he has gone beyond that? Tell me  
13 how.

14 MR. LINDVALL: What I -- why I objected, Your  
15 Honor, was I think he is mischaracterizing your claim  
16 construction to the jury.

17 THE COURT: Well, the jury has my claim  
18 construction. You have ten minutes to respond.

19 MR. LINDVALL: Okay.

20 THE COURT: If you think -- I mean --

21 MR. LINDVALL: I will address that in my  
22 rebuttal.

23 THE COURT: All right.

24 (End of sidebar conference.)

25 THE COURT: Mr. Kelleher, you have ten minutes

1 left.

2 MR. KELLEHER: Thank you, Your Honor.

3 Dependent claim 6 of the '339 patent, where I  
4 was, calls for withdrawing the stop member.

5 We didn't get an explanation from Dr. Kytomaa  
6 about how in the world a stop member is withdrawn from my  
7 client's product when rivets are ejected.

8 The mechanism that is in my client's product  
9 for advancing one rivet at a time, it's difficult to see on  
10 this product. You can see it on some of the others you will  
11 have in the juryroom. They move back and forth like this  
12 (indicating). And none of them ever become separated from  
13 the Cass cassette. It is never withdrawn from the cassette.  
14 So he hasn't proven infringement of claim 6 of the '339.

15 Now, our expert Michael Lawrence got on the  
16 stand yesterday and he testified to two particular ways in  
17 which my client does not infringe. He said with regard to  
18 the '216 patent, the claim element that the head -- the area  
19 of the rivet head has to be substantially equal to the area  
20 of the internal cross-section of the tube, and he showed you  
21 that that isn't true. That in fact in our product, the  
22 rivet head is quite a bit smaller than the tube. The  
23 proportions are similar to comparing a dime to a nickel.  
24 Those are not substantially equal.

25 And when Dr. Kytomaa got back up on the stand.

1 He did not rebut that at all.

2 My expert Michael Lawrence also explained how  
3 the Judge's claim construction requires that the axes, his  
4 claim interpretation that is, that the axes of the rivets be  
5 pointed in the direction of the axis of the tube.

6 And Michael, Mr. Lawrence, here is a photograph  
7 showing that the rivets don't actually do that. When air  
8 pressure is applied, they go a zig-zag. And that actually  
9 was not rebutted either when Dr. Kytomaa got on the stand.

10 Now, the earlier testimony that Mr. Lindvall  
11 referred to, and where he showed the video of the rivets  
12 advancing through the tube, very long rivets, chosen no  
13 doubt for that reason, if you look at the video you will see  
14 they slightly zig-zag. The axes don't point in the right  
15 direction for them to be covered in the claims.

16 As for passageways, this is an image from Dr.  
17 Kytomaa's presentation. He is pointing to longitudinal  
18 passageways, but it's the wall of the tube that he is pointing  
19 to, and air is somehow coming out of the wall into the interior  
20 of the tube. And these rivet heads are flush up against the  
21 surface of the inside wall. And as we have just shown you,  
22 Broetje doesn't do that with rivets in its tube. Rivets  
23 that are specified for our tubes are much smaller than that,  
24 and the rivets don't get anywhere near that big to be able  
25 to be flush with the wall. This is not our product that Dr.

1 Kytomaa was testifying about.

2 I also want to point out there a discussion with  
3 Dr. Kytomaa about his drawing imaginary circles. There is  
4 nothing in the patents about drawing imaginary circles to  
5 be able to find grooves or passageways. You will see the  
6 Judge's claim interpretation. He read them to you already.  
7 You will have them in the juryroom. There is nothing in  
8 Judge's claim interpretation about drawing imaginary circles  
9 in a pentagon to try to find where claim limitations, where  
10 claim elements are present.

11 Now, intent is an element of some of these  
12 patent issues. Simple infringement, no. We could  
13 accidentally infringe. We don't but we could.

14 But there are other things: Induced infringement,  
15 contributory infringement and willful infringement. Those  
16 require a bad mental state. And my client did not have a bad  
17 mental state. Why?

18 We proved it to you because they went out and  
19 got advice of a lawyer, Dr. Budach, and he gave them legal  
20 advice in 2003. And what did they do? They relied upon it.  
21 They acted upon it. They changed their design. So they  
22 believed it wouldn't infringe. And when they got accused  
23 two years later, they went back to him and said we have to  
24 double-check with you. Are you sure? And he said, yes, you  
25 don't infringe.

1           Now, I want to talk a little bit about invalidity,  
2           although we're very close to the end of my time here.

3           The patent Patent Office does make mistakes, as  
4           you heard in this case. They literally misspelled the name  
5           of the first named inventor. That is supposed to be  
6           Jean-Marc Auriol, and it's spelled Aurtoi on both patents.  
7           With all due respect to the Patent Office, these patents  
8           should not have issued either.

9           So because we're short, we are short on time in  
10          the case, you didn't get to hear everything about the prior  
11          art I would have liked to have told you.

12          This is something I showed you in the opening  
13          statement. Michael Lawrence identified it yesterday. It's  
14          the Brosene patent. It shows back in the '60s people had  
15          cassettes with filled with tubes filled with patents.

16          This is the Mauer patent. This was the patent  
17          that at his deposition, we showed the video, Jean-Marc  
18          Auriol refused to answer my question as to whether there are  
19          grooves or passageways in that pie-shaped tube and called my  
20          question pernicious.

21          These are the two prior art references that  
22          Mr. Lawrence spoke about. I want to talk first about the  
23          Offutt reference. So here we see a drawing of a gentleman,  
24          perhaps Mr. Offutt, with a coiled up tube around his body.  
25          And he has this tool that shows this column of rivets, and



1       there is a tube behind it. That is what is around his neck.

2               It's got the stop member here at the front. It  
3       has a stop member in the form of a valve here. There is  
4       another valve shown in the drawings by Mr. Lawrence pointed  
5       them out to you yesterday. And the Offutt patent says there  
6       is enough room for the air to get around the heads.

7               The Judge's construction of "passageways" which  
8       you will see is any hollow shape that goes down the length  
9       of the tube. If there is room around the rivet heads for  
10      the air to get through, there is passageways.

11              Now, you were shown the video where Mr. Lawrence  
12      during his deposition said he didn't think at the time that  
13      there were grooves there.

14              On redirect, I went and asked him: Are there  
15      passageways?

16              He said yes.

17              I said what is the judge's claim interpretation  
18      of grooves?

19              And he said passageways.

20              That's the Judge's claim interpretation. So  
21      passageways are there, grooves are there.

22              As Mr. Lawrence explained, every claim  
23      limitation of all the claims in this case can be found in  
24      Offutt.

25              There is one other thing to think about. We

1 heard from the deposition video of Mr. Bornes, when you take  
2 a round tube and you coil it up, as a matter of physics, he  
3 said, it will deform into an oval. And with an oval, you  
4 definitely have two passageways going down the side, even if  
5 there is some dispute as to whether you do with a circle or  
6 not.

7 So Shinjo, that's the patent application that  
8 was cited in the prosecution history. The examiners knew  
9 about it, yes. But like we said, the patent officers make  
10 mistakes.

11 The Shinjo reference, why are we so concerned  
12 about that? It's the one that says because of the shape of  
13 the channels, the air will get all the way down the channel  
14 from where you're feeding it all the way to very front of it  
15 and will touch the very first fastener you have in there.  
16 That is what they say in their patent is their invention  
17 with rivets.

18 So this has fasteners in it. We agree they're  
19 not rivets. We agree they're pointed at 90 degrees instead  
20 of having their axes pointing in the direction if they were  
21 rivets.

22 But Mr. Lawrence explained why it will be  
23 perfectly reasonable for a person of ordinary skill in the  
24 art to use rivets, and they would be able to use rivets with  
25 the Shinjo application, and if they did, everything would

1 point in the right direction and all of the claim limitations  
2 would be present, and there would be obviousness as to the  
3 '339.

4 THE COURT: You have two minutes left.

5 Peripheral guiding.

6 I guess it wasn't explained for the infringement  
7 purposes, but there is even a bigger problem with it.

8 You will read the Judge's instruction on  
9 indefiniteness. The public is entitled to know what is the  
10 precise definition of the claim elements so we can  
11 design-around it and make sure not to infringe.

12 I asked Mr. Auriol: What does it mean? I want  
13 to design a tube that doesn't have peripheral guiding.

14 He had no idea.

15 I asked Mr. Bornes.

16 He said there is no minimum or maximum distance  
17 between the wall, how I know how to design-around that.

18 Dr. Kytomaa told us yesterday, when he was  
19 talking about Shinjo, it doesn't have peripheral guiding  
20 because the rivets -- the fasteners only slide on one wall.

21 I don't see anything about that in the patent or  
22 Judge's claim interpretation. I don't think the public  
23 would have enough information to get the precise claim scope  
24 on peripheral guiding to be able to designed around it.  
25 That means any claim with peripheral guiding in it is invalid.

1           They knew that we were shipping their racks and  
2           their cassettes to Vought, Dallas in 2004 and we didn't buy  
3           cassettes from them. They were on notice. They said it was  
4           fishy. Mr. Hage did. They complained to Mr. Neugebauer:  
5           When are you going to order the cassettes?

6           Their lawyers when they complained to us a  
7           couple years later, in -- I'm sorry -- in 2005, said: You  
8           have been buying racks and loading stations without  
9           cassettes. They thought it was suspicious. Well, it was.  
10          They were on notice to do an investigation and they didn't.  
11          That is why the statute of limitations has run.

12          So the evidence has proved, ladies and  
13          gentlemen, that we don't infringe their trade dress. You  
14          should find in favor of us on everything. We don't infringe  
15          their patents. We didn't do it willfully certainly, and  
16          their patents are invalid.

17          Their damages are grossly overstated. As you  
18          have heard, they ignore costs. How can you ignore costs?

19          So your verdict, ladies and gentlemen, our  
20          customers look for the Broetje name. You should, too. On  
21          the verdict form, please sign for Broetje wherever you see  
22          it.

23          Thank you very much.

24          THE COURT: Time is up. Thank you, Mr. Kelleher.  
25          Plaintiffs have ten minutes remaining.

1                   MR. LINDVALL: At the beginning, I told you that  
2 I was going to show you actual testimony and documents here  
3 in my argument, and that is what I have shown you. The  
4 trial testimony, which was the actual testimony that was  
5 given for you and the actual documents.

6                   What I gave you as kind of a foresight or  
7 warning about was that you may see Broetje's counsel's  
8 characterization of the testimony. And I can tell you now,  
9 you probably saw that, you never saw one bit of testimony  
10 shown to you during his presentation.

11                  Remember, when I make an argument it's not  
12 evidence. When Mr. Kelleher makes an argument or he  
13 characterizes a witness's testimony that is not evidence.  
14 He has to show you the evidence. And I have showed the  
15 testimony and I have showed the documents. That is what you  
16 have to believe, not myself or not Mr. Kelleher.

17                  Let me address a couple of the issues that he  
18 raised.

19                  He made a big issue about, I believe he said no  
20 possibility whatsoever that anyone could be confused. Okay?  
21 Actually confused.

22                  Now, first of all, the jury's instruction will  
23 make it clear that -- the Court's instruction to you will  
24 make it clear you don't have to find actual specific  
25 confusion to find the trade dress infringement.

1                   Let's look at PDTX-266, please.

2                   Again, this is actual testimony. This is  
3                   Mr. Maylander, the Vice President of Marketing and Sales of  
4                   Broetje. This is the copy document, the internal document  
5                   that they used to copy the cassette.

6                   I asked him here in the examination whose  
7                   cassette that was, in their own document, and walked him  
8                   through some of the photographs.

9                   And as Mr. Kelleher said, he says it's very  
10                  simple. Anyone can figure out by looking at the back of the  
11                  cassette whose cassette it is. Anyone in the industry can.  
12                  So Mr. Maylander's who actually sells this to customers  
13                  certainly should be able to understand whose cassette this  
14                  is.

15                  "Answer: That's the back side of a rivet  
16                  cassette. It doesn't say anything, who it is.

17                  "Question: Do you know if that is a Broetje or  
18                  AHG?

19                  "Answer: I can't say that.

20                  So their own Vice President of Sales, who sells  
21                  these cassettes, on the stand in front of you, when I showed  
22                  him the back side of this cassette, couldn't determine whose  
23                  cassette that was.

24                  If that is not confusion, I don't know what it  
25                  is. It's their own person who is involved in selling their

1 own product.

2 Now, let me show you, if you put up PDTX-256,  
3 please.

4 They make a lot of argument about priority, they  
5 talk about this plastic cassette, but you will see in the  
6 jury instructions we're not claiming we own chrome color.  
7 What we're claiming is we have the same, they have the same  
8 look and feel. If you put our cassette side by side, yes,  
9 at times we may have had a clear plastic side but they still  
10 have the same look and feel. Someone looking at these could  
11 easily say, yeah, they're from the same person. It doesn't  
12 have to be exactly the same.

13 Just because there may be some clearness here,  
14 and chrome everywhere else, they're still the same size  
15 shape, the same handle, full plastic side. This could be  
16 confused.

17 It wouldn't be confused here, though (picking up  
18 red cassette). Different colors. Just the little window  
19 here. So there doesn't have to be this actual confusion,  
20 although with Mr. Maylander we saw that he even on the stand  
21 was confused about what cassette he was looking at.

22 Now, if you also look at, they talk about when  
23 they were selling things. If we could pull up PDTX-105,  
24 please.

25 This is a document -- this was a document I used

1 with Dr. Peters that was admitted into evidence. And if you  
2 can turn to the next page, please.

3 What this is, Dr. Peters testified this is from  
4 their AMS accounting system which he said was very reliable  
5 and is used by their auditors.

6 And right up here, this is the thing called ship  
7 date. And you see the first ship date? Shipping date, not  
8 receiving date. Shipping date from Germany. The first date  
9 is January 24th, 2005. Not 2004 but 2005. They represented  
10 to you it was 2004. This is something that Dr. Peters was  
11 an accurate depiction.

12 Now, you heard Mr. Benczkowski say these  
13 delivery slips can have typographical errors. But Dr.  
14 Peters said this is what they relied on. In fact, this is  
15 what they gave on us to rely on for damages. So if you see  
16 this, this is a printout from their system, and it shows the  
17 first shipment of their cassettes and it was in 2005, not  
18 2004.

19 So if we turn to PDTX-256.

20 This whole idea is wrong. It's wrong for two  
21 reasons. One of all, 2004 is not the right date. According  
22 to Dr. Peters' documents and their internal documents, the  
23 ship date was in 2005 somewhere. So we don't know when the  
24 metal, the metal sides mean anything, when that would be done.

25 The second thing is they're assuming just because



1 you have plastic clear sides that that is not the same trade  
2 dress. That is wrong. Somebody can get confused, and you  
3 will look at the factors in the jury instructions when you go  
4 through them. For example, copying is one of the factors.  
5 And guess what cassette they used to copy? It was this one  
6 here.

7 And there is also testimony in the record from  
8 Mr. Bornes. And this is probably the first time I said  
9 this. I don't have it in front of me. Mr. Bornes testified  
10 in 2003 that he told Broetje that we should change the sides  
11 to metal, and they went and used that idea. That testimony  
12 is in the record. Unfortunately, I don't have it to show it  
13 to you. It's the one time you will have to trust me on it.

14 Now, with respect to functionality. PDTX-247.  
15 And Broetje's counsel tried to say because everything has a  
16 function on the cassette, it can't be protected. Again,  
17 that is wrong. But even assuming that, when they came out  
18 with this cassette, and I asked Dr. Peters whether any of  
19 these changes to the color, the look, the feel, the handle,  
20 whether any of this had to do with function, was there any  
21 functional change, he said:

22 "Question: Now, was there any change with  
23 respect to the function of the cassette?

24 "Answer: We did not make any changes in the  
25 function of the cassette."

1                   These were all nonfunctional changes.

2                   Nonfunctional changes are protectable.

3                   Now, I believe with respect to Dr. Kytomaa, Dr.  
4                   Kytomaa, again this is an instance where you have to either  
5                   believe Mr. Kelleher or believe me, but I believe -- you  
6                   remember Dr. Kytomaa up there. He went through each element  
7                   of the claim in laborious fashion. It probably was tough to  
8                   follow because it was, he had to read out each claim  
9                   element. He went through each of the claim elements and  
10                  showed you where it was in the Broetje Parties. He didn't  
11                  skip any elements.

12                  This is not for you to believe me or believe  
13                  Mr. Kelleher. You were there. You watched Dr. Kytomaa.  
14                  You heard him. If he skipped something, I'm sure Mr.  
15                  Kelleher would have pointed out in his testimony. Did he  
16                  show you any testimony for Dr. Kytomaa saying, look, he  
17                  skipped that element? No.

18                  So you are not here to believe me or believe  
19                  Mr. Kelleher. Again, it's the witnesses you are here to  
20                  believe. They're the evidence.

21                  THE COURT: You have two minutes left.

22                  MR. LINDVALL: Thank you.

23                  I think in sum, again, I have to go back to the  
24                  whole motive here. They come up with all of these excuses,  
25                  false. Okay? Why do you continue buying our cassette for

1 11 or 12 years? Okay. Why, when we said we're going to go  
2 to Gemcore and sell our cassette, why did they get so upset?  
3 If our cassette was such a piece of junk, they would be  
4 happy if we sold it to Gemcore so Gemcore would have to deal  
5 with all of these hundreds and thousands of faults that they  
6 talk about. Why? It didn't make any sense. Well, we know  
7 why. We now are going to sell our cassette system to  
8 Gemcore. They were upset. Now Gemcore was going to have  
9 that same competitive advantage that Broetje had and they  
10 compete head to head.

11 That was a big concern with them. They didn't  
12 want to have that advantage of us -- of them having the AHG  
13 system also, because when they bid against each other,  
14 Gemcore could say we provide the AHG system, too, because we  
15 know the AHG system was a standard in the industry. So it  
16 made no sense.

17 So what did they do? They didn't tell  
18 Mr. Bornes, but they went out off and copied ours, our  
19 cassette. They didn't tell them. And they kept telling  
20 Mr. Bornes, put pressure on him by lying to him. We're  
21 going to go to somebody else, we're going to go to somebody  
22 else. You remember Mr. Neugebauer's e-mail. Six months  
23 after the development he said, we're thinking about changing  
24 or changing the relationship. No. They hadn't thought.  
25 They already decided. They concealed that fact from him.

1           Mr. Bornes didn't conceal the fact that he was  
2 going to Gemcore and trying to sell from them. Who are you  
3 going to believe in this case? Broetje or Mr. Bornes and  
4 AHG? I think the documents and the testimony makes it  
5 obvious.

6           Thank you very much.

7           THE COURT: Thank you.

8           Ladies and gentlemen of the jury, let's return  
9 to the jury instructions. I am going to read you the last  
10 few pages that I did not read to you yet and talk about  
11 the verdict sheet and it will begin time to begin  
12 deliberations.

13           I'm picking up with the final jury instructions,  
14 14.0, deliberation and verdict.

15           14.1. Introduction.

16           That concludes the part of my instructions  
17 explaining the rules for considering some of the testimony  
18 and evidence. Now let me finish up by explaining some  
19 things about your deliberations in the jury room, and your  
20 possible verdicts.

21           Once you start deliberating, do not talk to the  
22 jury officer, or to me, or to anyone else except each other  
23 about the case. If you have any questions or messages, you  
24 must write them down on a piece of paper, sign them, and  
25 then give them to the jury officer. The officer will give

1       them to me, and I will respond as soon as I can. I may have  
2       to talk to the lawyers about what you have asked, so it may  
3       take some time to get back to you. Any questions or  
4       messages normally should be sent to me through your  
5       foreperson, who by custom of this Court is Juror No. 1.

6               One more thing about messages. Do not ever  
7       write down or tell anyone how you stand on your votes. For  
8       example, do not write down or tell anyone that you are split  
9       4-4, or 6-2, or whatever your vote happens to be. That  
10      should stay secret until you are in fished.

11             14.2. Unanimous verdict.

12             Your verdict must represent the considered  
13      judgment of each juror. In order for you as a jury to  
14      return a verdict, it is necessary that each juror agree to  
15      the verdict. Your verdict must be unanimous.

16             It is your duty, as jurors, to consult with one  
17      another and to deliberate with a view towards reaching an  
18      agreement, if you can do so without violence to your  
19      individual judgment. Each of you must decide the case for  
20      yourself, but do so only after an impartial consideration of  
21      the evidence with your fellow jurors. In the course of your  
22      deliberations, do not hesitate to re-examine your own views  
23      and change your opinions, if you become convinced it is  
24      erroneous. But do not surrender your honest conviction as  
25      to the weight or effect of evidence solely because of the

1 opinion of your fellow jurors, or for the purpose of  
2 returning a verdict. Remember at all times that you are not  
3 partisans. You are judges -- judges of the facts. Your  
4 sole interest is to seek the truth from the evidence in the  
5 case.

6 A form of verdict has been prepared for you, and  
7 you have been provided a copy. I will read it to you  
8 shortly. You will take this form to the jury room and when  
9 you have reached unanimous agreement as to your verdict, you  
10 will have your foreperson fill in, date and sign the form.  
11 You will then return to the courtroom and your foreperson  
12 will give your verdict to my deputy.

13 It is proper to add the caution that nothing  
14 said in these instructions and nothing in the form of  
15 verdict is meant to suggest or convey in any way or manner  
16 any intimation as to what verdict I think you should find.  
17 What the verdict shall be is the sole and exclusive duty and  
18 responsibility of the jury.

19 14.3. Duty to deliberate.

20 Now that all the evidence is in and the  
21 arguments are completed, you are free to talk about the case  
22 in the jury room. In fact, it is your duty to talk with  
23 each other about the evidence, and to make every reasonable  
24 effort you can to reach unanimous agreement. Talk with each  
25 other, listen carefully and respectfully to each others

1 views, and keep an open mind as you listen to what your  
2 fellow jurors have to say. Try your best to work out your  
3 differences. Do not hesitate to change your mind if you are  
4 convinced that other jurors are right and that your original  
5 position was wrong. But do not ever change your mind just  
6 because other jurors see things differently, or just to get  
7 the case over with. In the end, your vote must be exactly  
8 that -- your own vote. It is important for you to reach  
9 unanimous agreement, but only if you can do so honestly and  
10 in good conscience.

11 No one will be allowed to hear your discussions  
12 in the jury room, and no record will be made of what you  
13 say. So you should all feel free to speak your minds.

14 Listen carefully to what the other jurors have  
15 to say, and then decide for yourself.

16 14.4. Do not consider what will happen after  
17 trial.

18 Members of the jury, in this case you may have  
19 heard or noticed inferences as to what may happen after this  
20 trial. You are to disregard any inferences as to what may  
21 happen after you have rendered your verdict.

22 And, finally, 14.5, Court has no opinion.

23 Let me finish up by repeating something that I  
24 have said to you earlier. Nothing that I have said or done  
25 during this trial was meant to influence your decision in

1 any way.

2 As I mentioned earlier, the lawyers' statements  
3 and arguments are not evidence. Their questions and  
4 objections are not evidence. Any of my comments and  
5 questions are not evidence. The notes taken by any juror  
6 are not evidence. You must decide the case yourselves based  
7 only on the evidence presented.

8 My legal rulings are not evidence, although you  
9 are required by your oath to follow my instructions and  
10 apply them to the evidence.

11 And that concludes the jury instructions. Let  
12 me turn your attention just briefly to the verdict form,  
13 which in itself is a fairly lengthy document, but has many  
14 fewer words than the instructions. I will read it to you.  
15 The pages are not numbered. I'm starting on a page that is  
16 entitled "Patent infringement, direct infringement."

17 Question 1 says U.S. Patent No. 5,011,339: Have  
18 Ateliers de la Haute-Garonne and F202 system S.A.S.  
19 (collectively, AHG) proven by a preponderance of the  
20 evidence that Broetje Automation-USA Inc. and Broetje  
21 Automation GmbH (collectively Broetje) infringed the claims  
22 of the '339 patent listed below?

23 There's essentially a table there for claims 1,  
24 2 and 6 and columns where you mark if you find for AHG or  
25 mark "no" if you find for Broetje.



1                   Then Question No. 2 relates to U.S. Patent No.  
2     5,143,216: Has AHG proven by a preponderance of the  
3     evidence that Broetje infringed the claims of the '216  
4     patent listed below?

5                   There's a table indicating claims 1 and 2. You  
6     mark "yes" if you find for AHG. You mark "no" if you find  
7     for Broetje.

8                   Then we move to questions relating to inducing  
9     infringement. Question 3 relates to the '339 patent: Has  
10    AHG proven by a preponderance of the evidence that Broetje  
11    Automation-USA Inc. induced a third party to infringe the  
12    claims of the '339 patent listed below?

13                  There's a table listing claims 1, 2 and 6. You  
14    mark "yes" if you find for AHG. You mark "no" if you find  
15    for Broetje.

16                  Then, again, for the '339 patent, we now ask you  
17    in Question 4: Has AHG proven by a preponderance of the  
18    evidence that Broetje Automation-GmbH induced a third party  
19    to infringe the claims of the '339 patent listed below?

20                  There's the same table, claims 1, 2 and 6. You  
21    mark "yes" if you find for AHG. You mark "no" if you find  
22    for Broetje.

23                  Question 4 relates to the GmbH entity whereas  
24    question three relates to the USA entities.

25                  You see something similar on the next side,

1 which asks you about contributory infringement.

2 Question 5, the '339 patent: Has AHG proven by  
3 a preponderance of the evidence that Broetje Automation-USA  
4 Inc. contributed to the infringement by a third party of the  
5 claims of the '339 patent listed below?

6 The table lists claims 1, 2 and 6. Mark "yes"  
7 if you find for AHG. Mark "no" if you find for Broetje.

8 Then Question 6, again related to the '339  
9 patent: Has AHG proven by a preponderance of the evidence  
10 that Broetje-Automation GmbH contributed to the infringement  
11 by a third party of the claims of the '339 patent listed  
12 below?

13 Again, claims 1, 2 and 6. Mark "yes" if you  
14 find for AHG. Mark "no" if you find for Broetje.

15 That takes us to the question about willful  
16 infringement.

17 Instruction: If you answered yes to any of  
18 questions 1, 3 or 5 above, answer question seven. Otherwise  
19 go to Question 8.

20 If you reach Question 7 consistent with that  
21 instruction, Question 7 relates to the '339 patent I asks  
22 you: Has AHG proven by clear and convincing evidence that  
23 Broetje Automation-USA Inc. willfully infringed the '339  
24 patent? You mark "yes" if you find for AHG. You mark "no"  
25 if you find for Broetje.

1           The instruction below Question 7 then says: If  
2   you answered "yes" to any of questions 1, 4 or 6 above,  
3   answer Question 8. Otherwise go to Question 9.

4           If following the instruction you've reached  
5   Question 8, it asks you with respect to the '339 patent:  
6   Has AHG proven by clear and convincing evidence that  
7   Broetje-Automation GmbH willfully infringed the '339  
8   patent? You mark "yes" if you find for AHG. You mark "no"  
9   if you find for Broetje.

10           Continuing on willful infringement. On the next  
11   page, you find an instruction. It says, if you answered yes  
12   to question two above, answer Questions 9 and 10.  
13   Otherwise, go to Question 11.

14           Following that instruction, if you get to  
15   Question 9, it relates to the '216 patent and asks you: Has  
16   AHG proven by clear and convincing evidence that Broetje  
17   Automation-USA Inc. willfully infringed the '216 patent?

18           Mark "yes" if you find for AHG. Mark "no" if  
19   you find for Broetje.

20           And then Question 10 again with respect to the  
21   '216 patent asks you: Has AHG proven by clear and  
22   convincing evidence that Broetje Automation GmbH willfully  
23   infringed the '216 patent?

24           Mark "yes" if you find for AHG. Mark "no" if  
25   you find for Broetje.

1                   Now I'm at invalidity question. First,  
2 anticipation.

3                   Question 11 asks you with respect to the '339  
4 patent: Has Broetje proven by clear and convincing evidence  
5 that the following claims of the 33 patent are invalid as  
6 anticipated by the prior art?

7                   For claims 1, 2 and 6, you mark "yes" if you  
8 find for Broetje. You mark "no" if you find for AHG.

9                   Question 12 asks regarding the '216 patent: Has  
10 Broetje proven by clear and convincing evidence that the  
11 following claims of the '216 patent are invalid as  
12 anticipated by the prior art?

13                   For claims 1 and 2, you mark "yes" if you find  
14 for Broetje. You mark "no" if you find for AHG.

15                   Obviousness.

16                   Question 13 relates to the '339 patent. It  
17 asks: Has Broetje proven by clear and convincing evidence  
18 that the following claims of the '339 patent are invalid as  
19 obvious based on the prior art?

20                   For each of claims 1, 2 and 6, you mark "yes"  
21 if you find for Broetje. You mark "no" if you find for AHG.

22                   Then at question 14, that asks you about the  
23 '216 patent: Has Broetje proven by clear and convincing  
24 evidence that the following claims of the '216 patent are  
25 invalid as office based on the prior art?

1 For claim 1 and claim 2, mark "yes" if you find  
2 for Broetje. Mark "no" if you find for AHG.

3 Indefiniteness.

4 Question 15. Has Broetje proven by clear and  
5 convincing evidence that the claims of the '339 patent are  
6 invalid because the claim term peripheral guiding is  
7 indefinite?

8 Mark "yes" if you find for Broetje. Mark "no"  
9 if you find for AHG.

10 That takes us to patent damages, and you have an  
11 instruction here, which reads:

12 If, one, you answered yes to any part of  
13 questions 1 to 10 above (that is, you found that one or more  
14 claims of U.S. Patent No. '339, or U.S. Patent No. '216 were  
15 infringed by Broetje);

16 And, two, with respect to any such infringed  
17 claim or claims, you answered no to Questions 11 to 15 above  
18 (that is, you found that such infringed claim or claims are  
19 not invalid);

20 Then answer Question 16. Otherwise, leave this  
21 question blank and go on to Question 17.

22 Question 16. If following this instruction you  
23 reach it, asks you: What amount of damages is AHG entitled  
24 to as compensation for Broetje's infringement of the '339  
25 patent and/or the '216 patent?

1                   And now we're at trade dress, unfair  
2 competition, and intentional interference with prospective  
3 economic advantage claims.

4                   First, trade dress infringement.

5                   Question 17. Has AHG proven by a preponderance  
6 of the evidence that Broetje infringed AHG's trade dress?  
7 Mark "yes" if you find for AHG. Mark "no" if you find for  
8 Broetje.

9                   Then you are given an instruction: If you  
10 answered yes to Question 17, then proceed to Questions 18  
11 and 19. Otherwise, skip Questions 18 and 19 and proceed to  
12 Question 20.

13                   If you reach question 18, it asks you: Has AHG  
14 proven that Broetje Automation-USA Inc. intentionally  
15 infringed AHG's trade dress?

16                   Mark "yes" if you find for AHG. Mark "no" if  
17 you find for Broetje.

18                   At Question 19, you're asked: Has AHG proven  
19 that Broetje Automation GmbH intention physically infringed  
20 AHG's trade dress?

21                   Mark "yes" if you find for AHG. Mark "no" if  
22 you find for Broetje.

23                   I'm now at the page with the header unfair  
24 competition (Federal and State law). And it tells you, the  
25 parties have stipulated that if you find that Broetje

1 infringed AHG's trade dress, then Broetje is also liable for  
2 unfair competition under federal and State law. Please  
3 proceed to the next question.

4 Next is intentional interference with  
5 prospective economic advantage.

6 Question 20 asks you: Has AHG proven by a  
7 preponderance of the evidence that Broetje Automation-USA  
8 Inc. intentionally interfered with AHG's prospective  
9 economic advantage?

10 Mark "yes" if you find for AHG. Mark "no" if  
11 you find for Broetje.

12 Question 21. Has AHG proven by a preponderance  
13 of the evidence that Broetje Automation GmbH intentionally  
14 interfered with AHG's prospective economic damage?

15 Mark "yes" if you find for AHG. Mark "no" if  
16 you find for Broetje.

17 Next is damages on trade dress, unfair  
18 competition, and intentional interference with prospective  
19 economic advantage claims.

20 Question 22. Before May 12, 2007, did AHG  
21 discover, or know of facts that would have caused a  
22 reasonable person to suspect, that Broetje was selling  
23 its allegedly infringing rivet cassettes in the United  
24 States?

25 Mark "yes" if you find for Broetje. Mark "no"

1 if you find for AHG.

2 Then there's an instruction: If you answered  
3 yes to Question 22, then answer Question 23. If you  
4 answered no to Question 22, continue to Question 24.

5 Question 23, should you reach it, asks you:  
6 Before May 12, 2006, did AHG discover, or know of facts that  
7 would have caused a reasonable person to suspect that  
8 Broetje was selling its allegedly infringing rivet cassettes  
9 in the United States?

10 Yes is for Broetje. No is for AHG.

11 Then Question 24: What amount of damages is AHG  
12 entitled to as compensation for trade dress infringement,  
13 unfair competition under federal law, unfair competition  
14 under state law, or intentional interference with a  
15 prospective economic advantage?

16 There's a blank there for you to fill in an  
17 amount.

18 And then Question 25: If you answered "yes" to  
19 question 18 or 19, finding that either Broetje  
20 Automation-USA Inc. or Broetje Automation GmbH intentionally  
21 infringed AHG's trade dress (which the parties have  
22 stipulated to mean Broetje is liable for unfair competition  
23 under state law), or "yes" to question 20 or 21, finding  
24 that either Broetje Automation-USA Inc. or Broetje  
25 Automation GmbH intentionally interfered with AHG's



1 prospective economic advantage, what amount of punitive  
2 damages, if any, do you award AHG?

3 And then again a space for you to mark in an  
4 amount.

5 And then on the very last page it instructs you,  
6 you have now reached the end of the verdict form and should  
7 review it to ensure it accurately reflects your unanimous  
8 determination. All jurors should then sign and date the  
9 verdict form in the spaces below and notify the Court  
10 security officer that you have reached a verdict. The  
11 presiding juror should retain possession of the verdict form  
12 and bring it when the jury is brought back into the  
13 courtroom. And there's a space for it to be dated and for  
14 all eight of you to sign it.

15 That completes my reading and we'll now call  
16 forward our security officer. Mr. Looby will administer the  
17 oath.

18 (Court security officer placed under oath to  
19 watch the jury.)

20 THE COURT: Thank you. We'll now take the jury  
21 out.

22 (Jury left courtroom.)

23 THE COURT: All right. Have a seat. And I'm  
24 going to talk for a little while.

25 First, a couple things that I would like you

1 all to meet and confer on during the course of the jury  
2 deliberations. Then we'll have the time sometime today to  
3 talk about results of whatever your meet and confer yields.

4 I'm concerned that if there is any  
5 inconsistencies on the verdict form, I always review the  
6 verdict form before I have it read, but I don't always  
7 notice if there are inconsistencies.

8 I will try to be, of course, as careful as I  
9 can but it is a complicated verdict form. I'll probably  
10 take some time, probably at sidebar, with the assistance of  
11 my law clerk to review it before it is read in open court.

12 If we were to notice an inconsistency, what I  
13 would like is your considered views on what should I do at  
14 that point. So take some time over the course of the  
15 afternoon to meet and confer on that. And when we next  
16 speak, I'll ask you what your proposals are as to what I  
17 should do if I do think I see any inconsistency.

18 Additionally, if both sides agree, assuming we  
19 get a verdict whenever we do, I'd like to provide you the  
20 opportunity to speak with the jury, if any of the jurors  
21 wish to stay afterwards. But I will only give you that  
22 opportunity if both sides agree they want it and if you make  
23 a representation on the record at the appropriate time that  
24 you won't use anything that you hear in those discussions in  
25 any post-trial motions or on appeal.

1           So think about that because I will at some point  
2 ask you those questions and see if you want to have that  
3 opportunity.

4           Let me take a few minutes and just put on the  
5 record some of the thinking that went into our rulings on  
6 the jury instructions and the verdict sheet.

7           All right. I think I've got these notes pretty  
8 much in order of the jury instructions.

9           With respect to Broetje's proposed instruction  
10 4.6 regarding design-around, we deleted that instruction as  
11 we didn't think it was necessary or appropriate to explain  
12 the policy behind design-arounds.

13           On 5.0, we kept in the instruction on willful  
14 infringement because I thought the jury having heard the  
15 evidence, it will be helpful for them to give us their  
16 views on whether willfulness has been proven or portions of  
17 willfulness.

18           On 6.8, obviousness, level of ordinary skill,  
19 we kept AHG's contention of characterization of one of  
20 ordinary skill, and we also included Broetje's position  
21 though with rewrote it to make it more clear. We thought it  
22 was appropriate to give both sides' views and we were not  
23 persuaded that Broetje's view was new or in any way unfair  
24 or surprising to AHG.

25           On 6.9, obviousness - objective criteria, we

1 did not add AHG's proposal regarding a presumption of a  
2 relationship between commercial success and the patent. We  
3 also didn't include anything about whether that presumption  
4 would be rebuttable. I thought all that was unnecessary and  
5 would be confusing.

6 On 6.10, indefiniteness. We combined the  
7 parties proposals, mostly relying on AHG's which we thought  
8 was accurate and appeared to be I think derived from the  
9 AIPLA and District of Delaware model instruction.

10 7.6, generic trade dress. We took Broetje's  
11 proposal and integrated it into the secondary meaning  
12 instruction which we thought was accurate, appropriate and  
13 helpful especially given where we placed it.

14 On 7.8, likelihood of confusion. We resolved  
15 the dispute about distribution channels by including both  
16 parties' proposals. That is, if they were likely sold to  
17 the same or similar customers or sold through the same  
18 distribution channels, that could contribute to a finding of  
19 likelihood of confusion. The test itself is not exhaustive  
20 and we thought both of what the parties proposed could  
21 support a finding of confusion.

22 On 8.8, unfair competition. We clarified the  
23 parties' agreement about the verdict on unfair competition  
24 following directly from the verdict on trade dress  
25 infringement.

1                   9.1. On the elements of the intentional  
2 interference claim, as you will have seen, we will have  
3 concluded that the California state claim was not preempted  
4 by federal patent law. The Federal Circuit has noted there  
5 is an underlying presumption disfavoring preemption. That  
6 is at least in the Hunter Douglas decision of the Federal  
7 circuit.

8                   By agreement, there is no field preemption so  
9 the issue was just conflict preemption. We found no such  
10 preemption here as California law requires multiple elements  
11 to be proven, only one of which may, but need not necessarily  
12 be, satisfied by a finding of patent infringement. California  
13 law is not regulating the protection of innovation but rather  
14 regulating how entities compete in the marketplace. So we saw  
15 no conflict, despite the fact that one outcome may be that  
16 the type of damages, enhanced damages essentially, that can be  
17 obtained on a preponderance finding under California law is  
18 different than what could be found based on just a finding of  
19 preponderance under federal patent law. Again, there are all  
20 those additional elements in order to reach that decision  
21 under California law.

22                   At bottom, in the Court's view, the state law  
23 here does not "stand as obstacle to the accomplishments and  
24 execution of the full purposes and objectives of Congress."  
25 It's a quote from a decision in this District. I believe it

1 was Judge Jordan in the *Cryovac* decision, 430 F. Supp. 2nd  
2 at 358. Just as he found the state law there, we find here  
3 there is no obstacle.

4 Moving on, 10.1, patent damages. Generally, we  
5 thought both parties were correct in regards to the one  
6 dispute that they had. So we told the jury that they could  
7 base their evaluation of reasonable certainty on either  
8 expert or opinion evidence.

9 10.2B, the date for patent damages. We adopted  
10 Broetje's proposal which we thought was more complete and  
11 clear but we did move some things around hopefully in at  
12 least an effort to make things even more clear.

13 At 10.11, lost profits, doubts resolved against  
14 the infringer. We adopted that proposal with some  
15 modification. We thought it was a correct statement of law.  
16 Broetje indicated they thought some motion in limine  
17 precluded the inclusion of that instruction, didn't tell  
18 us which, if any, motion in limine that was, and we couldn't  
19 figure it out, so we didn't find anything that precluded us  
20 from finding that instruction.

21 11.2a. Damages for trade dress infringement.  
22 We used AHG's most recent -- no, I'm sorry. We used AHG's  
23 proposal which listed the various factors to consider but we  
24 deleted that No. 5, the corrective advertising. AHG agreed  
25 it was proper to delete that one. We thought the remainder

1 of AHG's proposal was accurate and not unduly confusing, and  
2 we thought evidence was presented that the jury might find  
3 could support some or all of those other factors.

4 11.3a, damages for trade dress infringement we  
5 adopted. This is the one we adopted AHG's revised proposal  
6 which I think we got yesterday morning which we thought  
7 correctly instructed the jury that it can award damages  
8 based on any revenues it finds "resulted from the use of  
9 AHG's trade dress."

10 The parties were permitted to argue whether or  
11 not evidence was presented that would allow a finding in  
12 this regard of anything other than just the cassettes, but  
13 we thought what AHG came up with was an accurate statement  
14 of the law. Notably, neither side found a case that was  
15 directly on point, nor did we. And there is some degree of  
16 equitable considerations that has to go into this.

17 I think by the parties' agreement under the case  
18 law and in the Court's view, I think equitable considerations  
19 support the instruction that we came up with which was AHG's  
20 revised proposal.

21 On 11.6, trade dress statute of limitations. We  
22 agreed with Broetje that because it is a common law claim,  
23 the applicable statute of limitations was two years and not  
24 four years.

25 11.13, no duplicative damages. We added

1 Broetje's introduction and clarified that the no duplication  
2 instruction does not apply to punitive damages.

3 13.0, we added our foreign law instruction.

4 Just one additional note. Any instructions  
5 that Broetje proposed that they were indicating they were  
6 expressly proposed for purposes of preserving rights on  
7 appeal, we did not adopt any of those instructions.

8 And then just briefly on the verdict form, you  
9 figured out undoubtedly what we decided but we did think it  
10 was appropriate on all of the intent claims to separate out  
11 the two Broetje entities. We thought it was appropriate  
12 to separate out, for separate findings, anticipation and  
13 obviousness.

14 On patent damages, we tried to come up with a  
15 sort of if-then logical chain that would hopefully lead the  
16 jury to what with I think we all agree was the intent as to  
17 when and how they should reach that issue.

18 On the statute of limitations, I thought it  
19 would be helpful with the jury having heard the evidence  
20 to give us some feedback on statute of limitations, and we  
21 thought that we could not improve upon defendants' proposal  
22 on those two questions and we went with those.

23 You will need to make sure we no how reach you  
24 if, and when, any questions come up. So make sure Mr.  
25 Lobby knows how to reach both sides.



1 Any issues or questions from the plaintiffs  
2 before we break?

3 MR. LINDVALL: No, Your Honor.

4 THE COURT: And defendants?

5 MR. KELLEHER: No, Your Honor.

6 THE COURT: All right. Thank you very much. We  
7 will be in recess.

8 (Recess taken while jury deliberated.)

9 \* \* \*

10 (Proceedings reconvened after recess.)

11 THE COURT: Have a seat.

12 So we got a note which says: "Need  
13 clarification on Question 22 and 23," which I think are the  
14 statute of limitations questions. It doesn't say anything  
15 else other than being signed and have a juror number on it.

16 So again, in total, it appears to read: "Need  
17 clarification on Question 22 and 23." So, obviously, I want  
18 your thoughts on what to do about this.

19 MR. LINDVALL: 22 and 23 are the damages on  
20 trade dress? That's what we have.

21 THE COURT: Yes, damages on trade dress. Before  
22 May 12, 2007, did AHG discover and then before May 12, 2006,  
23 did AHG discover. That is what 22 and 23 are on the verdict  
24 sheet. So I assume that is what they're referring to.

25 MR. LINDVALL: Right. Okay.

1 THE COURT: But I know nothing more than what is  
2 on the note, of course. So take a moment and confer amongst  
3 yourselves and then you can confer with each other, if you  
4 like, about what your proposals are.

5 MR. LINDVALL: Okay.

6 (Counsel confer.)

7 THE COURT: Mr. Lindvall, do you need more time?

8 MR. LINDVALL: No, Your Honor.

9 THE COURT: Mr. Kelleher, do you want some more  
10 time?

11 MR. KELLEHER: May I have one moment, Your  
12 Honor, please?

13 THE COURT: Sure.

14 (Counsel confer.)

15 THE COURT: Do you want to confer with  
16 Mr. Lindvall, see if he might be in the same place?

17 (Counsel confer.)

18 THE COURT: Mr. Lindvall, what is your view?

19 MR. LINDVALL: Your Honor, our view is since  
20 this was not, neither one of these questions are essential  
21 to come up with a verdict, we think probably in the interest  
22 of avoiding confusion and any delay is that the jury be  
23 told we remove these questions from them and let Your Honor  
24 address along with the equitable tolling and all the other  
25 statute of limitations.

1 THE COURT: These are really advisory findings;  
2 is that correct?

3 MR. LINDVALL: Correct. We think in that case,  
4 just in order to avoid confusion that we bypass them and let  
5 them do whatever they have been doing after that.

6 THE COURT: Mr. Kelleher, does the defendant  
7 concur in that?

8 MR. KELLEHER: Your Honor, we thought about it.  
9 We see it as a reasonable fallback position. Our initial  
10 impulse is to refer the jurors back to the instructions and  
11 see if reading them again might answer whatever questions  
12 they have, which we're not exactly sure what they are.

13 THE COURT: So what would you have me do?  
14 Just tell them I would refer you to -- in response to your  
15 question, I would refer you to the following instructions?

16 MR. KELLEHER: That was our initial impulse,  
17 Your Honor. And if they still express confusion in a  
18 reasonable amount of time, I suppose we would concur with  
19 taking way the questions.

20 THE COURT: Mr. Lindvall, what is your view?

21 MR. LINDVALL: Your Honor, the instructions I  
22 don't think will really enlighten them on this anymore than  
23 what they say. I think by doing that, it is just going to  
24 end up putting us back in the same situation and bouncing  
25 back.

1 I think the best way to do this, since it is  
2 an advisory opinion, the Court has the discretion to remove  
3 them on this period of time since has been a cause of  
4 conflict for them.

5 THE COURT: You are not persuaded, Mr. Kelleher?

6 And I'm not trying -- I will tell you I'm not  
7 going to change the verdict sheet unless you all agree that  
8 I should do that.

9 MR. KELLEHER: Right.

10 THE COURT: So I'm not trying to get you to  
11 change your position, if that is your position. I'm not  
12 going to change the verdict sheet yet, but if that is not  
13 your position, then we could save ourselves some time  
14 possibly.

15 MR. KELLEHER: I think, Your Honor, I can, given  
16 what I have heard, I could agree with Mr. Lindvall's proposal.

17 THE COURT: All right. Well, then I take it  
18 maybe the way to do this is for me to bring the jury in, for  
19 me to tell them in response to their question, I'm directing  
20 them that they do not have to answer Questions 22 and 23.

21 And then I will also tell them we would like  
22 to know if they intend to stay past 4:30. If they all  
23 unanimously agree they want to stay past 4:30 they should do  
24 so, but given the time of day they should let us know that.

25 Any objection from plaintiffs?

1 MR. LINDVALL: No, Your Honor.

2 THE COURT: And from defendants?

3 MR. KELLEHER: No, Your Honor.

4 THE COURT: Okay. Ms. Sharp.

5 MS. SHARP: Just an observation. Could we  
6 confer?

7 THE COURT: Yes, you can confer. Sure.

8 (Counsel confer.)

9 MR. LINDVALL: I think Ms. Sharp just had a  
10 clerical issue. If you did strike these, then the  
11 instruction on 22 where it says to go to 24, they would  
12 obviously go to 24 and 25.

13 THE COURT: All right. So I appreciate that.

14 So I think what I'm going to say to them is, in  
15 response to your question, you do not have to answer  
16 questions 22 and 23, but regardless of whether you answer  
17 question 22 and 23, you must answer question 24 and -- you  
18 must go on to question 24?

19 MR. LINDVALL: Yes, Your Honor.

20 THE COURT: Does that work? Mr. Kelleher, do  
21 you agree with that?

22 MR. KELLEHER: I think that's correct, Your  
23 Honor.

24 THE COURT: All right. Let me write that down  
25 so I get that right.

1 All right. I am going to bring them in and say,  
2 in response to your question, you do not have to answer  
3 questions 22 and 23, but whether you answer question 22 and  
4 23 or not, you must go on to question 24. Correct?

5 MR. LINDVALL: Yes, your Honor. That's fine.

6 THE COURT: Correct, Mr. Kelleher?

7 MR. KELLEHER: Yes, your Honor.

8 THE COURT: All right. Let's bring the jury  
9 back in.

10 (The jury entered the courtroom.)

11 THE COURT: Ladies and gentlemen of the jury, I  
12 brought you in here to respond to your note that you sent  
13 out.

14 In response to your question, you do not have to  
15 answer question 22 and 23, but whether or not you answer  
16 question 22 and 23, you should follow the instructions for  
17 going on to question 24. So, again, in response to your  
18 question, you do not have to answer question 22 and 23, but  
19 whether or not you answer question 22 and 23, follow the  
20 instructions for going on to question 24. That's my answer  
21 to your question.

22 Separately, I have essentially a question for  
23 you, which I will ask you to go back in, respond to with a  
24 note after you go back into the jury room, which is, in  
25 light of the time of day it is, we need to know whether you

1 have or do unanimously decide to stay beyond 4:30. If you  
2 all agree to do that, you can stay as long as you want. If  
3 you don't all agree to stay beyond 4:30, then you'll come  
4 back Monday at 9:00 a.m. and continue with your  
5 deliberations. So please send us a note after you've made  
6 that decision. Thank you.

7 (The jury was excused to the jury room.)

8 THE COURT: All right. Have a seat.

9 Any questions or concerns about what just  
10 happened here, Mr. Lindvall?

11 MR. LINDVALL: No, Your Honor.

12 THE COURT: Mr. Kelleher?

13 MR. KELLEHER: No, Your Honor.

14 THE COURT: All right. So if we were to get a  
15 verdict, have you all talked about what I should do about  
16 reviewing that and what I should do if I see any  
17 inconsistency? Mr. Lindvall?

18 MR. LINDVALL: Yes. I believe we've come to an  
19 agreement, Your Honor. What we would do is treat of kind of  
20 like a question. If you see an inconsistency in there, you  
21 consult with the two of us, we figure out how, what kind of  
22 questions or what instructions you could give them to  
23 eliminate the conflict or the inconsistency in the verdict  
24 form so that they, they can go back and then remedy it.

25 THE COURT: So if I think I see an

1 inconsistency, would you have me tell you the substance of  
2 what appears to be the inconsistency?

3 MR. LINDVALL: Yes. Tell us the substance of  
4 it. We would come up with some type of instruction that you  
5 could give the jury to eliminate that inconsistency so that  
6 you continue to deliberate.

7 THE COURT: Okay. Mr. Cahr?

8 MR. CAHR: That's not perfectly our  
9 understanding. Not to say that you are misstating it.  
10 There may have been a misunderstanding. Our understanding  
11 was that it was going to be more along the lines of, if  
12 there's an inconsistency that you identify, you wouldn't  
13 tell us what the inconsistency would be, but you would  
14 simply tell them there's an inconsistency in your verdict.  
15 Please return to deliberations.

16 THE COURT: That sounds like no agreement.

17 MR. CAHR: No, no, no.

18 THE COURT: They are both reasonable proposals,  
19 but they sound different to me.

20 MR. LINDVALL: Yes. Sorry.

21 THE COURT: Okay. Well, that is helpful. You  
22 know, we'll see if we have a verdict. We may have a chance  
23 to talk about it further. I'm not quite sure what I will  
24 do.

25 And in terms of meeting with the jury, have you



1 all talked about that at all? Do you have a view?

2 MR. CAHR: That I think we are definitely in  
3 agreement on.

4 THE COURT: Okay.

5 MR. CAHR: We both want to do that.

6 THE COURT: You both want to do that?

7 MR. CAHR: Yes.

8 MR. LINDVALL: Yes.

9 THE COURT: You'll be prepared to make those  
10 representations? Sit tight. I think we'll hear whether  
11 they are going to stick around. We'll be in recess.

12 (Court recessed while jury continues  
13 deliberations.)

14 \* \* \*

15 (Proceedings reconvened after recess.)

16 THE COURT: You have been provided copies of  
17 this note; is that correct?

18 MR. LINDVALL: Yes.

19 THE COURT: It looks to me like it says: "We  
20 have completed deliberation." Maybe I'm being too lawyerly.  
21 I don't know if that for sure means it is a verdict, so I  
22 thought I would bring them in and say do you have a verdict?  
23 And if they say yes, then I'll have them hand it to us.

24 Is there any objection to that approach?

25 MR. LINDVALL: No, Your Honor.

1 MR. KELLEHER: No, Your Honor.

2 THE COURT: All right. Let's bring the jury in.

3 (Jury returned.)

4 THE COURT: Welcome back, ladies and gentlemen  
5 of the jury.

6 Have you reached a verdict.

7 A JUROR: Yes, we have, Your Honor.

8 THE COURT: All right. Then I will have you  
9 hand the verdict sheet to Mr. Golden.

10 (Verdict sheet passed to the Deputy Clerk, and  
11 then to the Court.)

12 THE COURT: I'll ask for your patience while I  
13 review it.

14 (The Court goes to sidebar and reviews the  
15 verdict sheet with the law clerk.)

16 THE COURT: Thank you for your patience. I'll  
17 now have Mr. Golden read the verdict.

18 THE DEPUTY CLERK: As to Question 1. Patent  
19 infringement. Direct infringement. U.S. Patent No.  
20 5,011,339:

21 The jury has determined that claims 1, 2, and 6  
22 have been infringed under the '339 patent.

23 U.S. Patent No. 5,143,216.

24 Has AHG proven infringement of the '216 patent  
25 claims for claims 1 and 2?

1 The box "yes" has been checked.

2 Question 3 regarding the '339 patent.

3 Has AHG proven infringement induced a third  
4 party to infringe the claims of the '339 patent?

5 The lines for claims 1, 2, and 6 have been  
6 checked "yes."

7 Question No. 4. Has AHG proven that defendant  
8 has induced a third party to infringe the claims of the '339  
9 patent?

10 Claims 1, 2, and 6, the lines have been checked  
11 "yes."

12 Question No. 5. Has AHG proven defendant  
13 contributed to the infringement by a third party of the  
14 claims of the '339 patent?

15 The lines "yes" have been checked for claims 1,  
16 2, and 6.

17 Question No. 6. Has AHG proven that defendant  
18 contributed to infringement by a third party of the  
19 following '339 patent claims?

20 The box "yes" has been checked for claims 1, 2,  
21 and 6.

22 Question No. 7. Has AHG proven by clear and  
23 convincing evidence that the defendant willfully infringed  
24 the '339 patent?

25 The box "yes" has been checked.

1           Question No. 8. Has AHG proven by clear and  
2           convincing evidence that defendant willfully infringed the  
3           '339 patent?

4           The line "yes" has been checked.

5           Question No. 9. Has AHG proven by clear and  
6           convincing evidence that the defendant willfully infringed  
7           the '216 patent?

8           The box "yes" has been checked.

9           Question No. 10. Has AHG proven that defendant  
10          willfully infringed the '216 patent?

11          The line "yes" has been checked.

12          Question No. 11. Has defendant proven by clear  
13          and convincing evidence that the following claims of the  
14          '339 patent are invalid as anticipated?

15          Regarding claims 1, 2 and 6, the box "no" has  
16          been checked.

17          Question No. 12. Has defendant proven that  
18          the following claims of the '216 patent are invalid as  
19          anticipated by the prior art?

20          Regarding claims 1 and 2, the box "no" has been  
21          checked.

22          Question No. 13. Has defendant proven that the  
23          following claims of the '339 patent are invalid as obvious?

24          Regarding claims 1, 2, and 6, the line "no" have  
25          been checked.

1                   Question No. 14. Has defendant proven that the  
2 following claims of the '216 patent are obvious based on the  
3 prior art?

4                   The lines for claims 1 and 2 have been checked  
5 "no."

6                   Question No. 15. Has defendant proven that the  
7 claims of the '339 patent are invalid because "peripheral  
8 guiding" is indefinite?

9                   The line "no" has been checked.

10                  Question No. 16 under the Patent Damages  
11 section.

12                  What amount of damages is AHG entitled to as  
13 compensation for defendant's infringement of the '339 and/or  
14 '216 patent?

15                  The amount \$2,099,943 has been written in.

16                  Question 17. Has AHG proven that defendant  
17 infringed AHG's trade dress?

18                  The line "yes" has been checked.

19                  Question No. 18. Has AHG proven that the  
20 defendant intentionally infringed AHG's trade dress?

21                  The line "yes" has been checked.

22                  Question 19. Has AHG proven that defendant  
23 intentionally infringed AHG's trade dress?

24                  The line "yes" has been checked.

25                  Question No. 20. Has AHG proven that defendant

1 intentionally interfered with AHG's prospective economic  
2 advantage?

3 The line "yes" has been checked.

4 Question No. 21. Has AHG proven that defendant  
5 intentionally ly interfered with AHG's prospective economic  
6 advantage?

7 The line "yes" has been checked.

8 Question No. 22. Before May 12th of 2007, did  
9 AHG discover, or know the facts that would have caused the  
10 person to suspect that defendant was selling its allegedly  
11 infringing rivet cassette case -- cassettes in the United  
12 States?

13 The line "no" has been checked.

14 Question No. 23. Neither box is touched as in  
15 checked.

16 Question No. 24. What amount of damages is AHG  
17 entitled to as compensation for trade dress infringement,  
18 unfair competition under federal law, unfair competition  
19 under state law, or intentional interference with a  
20 prospective economic advantage?

21 The amount \$6 million has been written in.

22 Question No. 25. If you answered "yes" to 18 or  
23 19, finding, et cetera, to Question 21, what amount of  
24 punitive damages, if any, do you award to AHG?

25 The amount \$6 million has been written in.

1                   It is dated the 11th day of April, 2014, and  
2                   signed by all eight jurors.

3                   THE COURT: Thank you very much, Mr. Golden.

4                   Mr. Lindvall, would you like to have the jury  
5                   polled?

6                   MR. LINDVALL: Yes, Your Honor.

7                   THE COURT: Okay. Mr. Golden, poll the jury.

8                   THE DEPUTY CLERK: Certainly, Your Honor.

9                   Juror No. 1, is the verdict read in court -- is  
10                  the verdict read in court true and correct and supported  
11                  before your vote?

12                  THE FOREMAN: Yes, it is.

13                  THE DEPUTY CLERK: Juror No. 2, is the verdict  
14                  read in court true and correct and supported before your  
15                  vote?

16                  JUROR NO. 2: Yes, it is.

17                  THE DEPUTY CLERK: Juror No. 3, is the verdict  
18                  read in court true and correct and supported before your  
19                  vote.

20                  JUROR NO. 3: Yes, it is.

21                  THE DEPUTY CLERK: Juror No. 4, is the verdict  
22                  read in court true and correct and supported before your  
23                  vote?

24                  JUROR NO. 4: Yes, it is.

25                  THE DEPUTY CLERK: Juror No. 5, is the verdict

1 read in court true and correct and supported before your  
2 vote?

3 JUROR NO. 5: Yes, it is.

4 THE DEPUTY CLERK: Juror No. 6, is the verdict  
5 read in court true and correct and supported before your  
6 vote?

7 JUROR NO. 6: Yes, it is.

8 THE DEPUTY CLERK: Juror No. 7, is the verdict  
9 read in court true and correct and supported before your  
10 vote?

11 JUROR NO. 7: Yes, it is.

12 THE DEPUTY CLERK: Juror No. 8, is the verdict  
13 read in court true and correct and supported before your  
14 vote?

15 JUROR NO. 8: Yes, it is.

16 THE DEPUTY CLERK: Thank you.

17 THE COURT: Thank you, Mr. Golden.

18 And thank you, ladies and gentlemen of the jury.  
19 I know it has been a long week and we're here essentially on  
20 overtime right now. I know on behalf the parties and my  
21 colleagues and really the entire judicial system, we are  
22 very grateful to you. We could not do our work without the  
23 strong efforts and time and devotion of citizens like you  
24 and I really appreciate it.

25 I'm going to need to hold on to you for just a



1 couple more minutes. If you can go back to the juryroom and  
2 start collecting your things. There are a few other things  
3 I want to say to you, and I want to thank you personally,  
4 and so I will see you very shortly back in the juryroom.

5 Thank you very much.

6 (Jury left courtroom.)

7 THE COURT: So notwithstanding the hour, if the  
8 parties are still interested and any jurors want to stay,  
9 I'm happy to have you talk to them. Is that still something  
10 plaintiffs are interested in doing?

11 MR. LINDVALL: Yes, Your Honor.

12 THE COURT: And defendants?

13 MR. KELLEHER: Yes, Your Honor.

14 THE COURT: All right. So, Mr. Lindvall, do you  
15 represent on behalf of your client that you will not use  
16 anything that you learn in discussions with the jury, if  
17 there are any, in any further motions in front of me or on  
18 appeal or in any other legal proceeding?

19 MR. LINDVALL: I do, Your Honor. And I assume  
20 there won't -- will not be a written record being taken.

21 THE COURT: There is no written record. That's  
22 correct.

23 Mr. Kelleher, you agree to the same?

24 MR. KELLEHER: I do.

25 THE COURT: All right. Well, I'll go back and

1 if any of them are willing to stay, we'll let you know that.

2 (Jury trial proceedings end at 5:26 p.m.)

3

4 I hereby certify the foregoing is a true and accurate  
5 transcript from my stenographic notes in the proceeding.

6

7

/s/ Brian P. Gaffigan  
Official Court Reporter  
U.S. District Court

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